EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(1)

PROCEEDINGS AND ORDERS

DATE: 030786

CASE NBR 85-1-00727 CFX
SHORT TITLE MO Farmers Assn.
VERSUS United States

DOCKETED: Oct 29 1985

Date	Proceedings and Orders
Oct 29 1985	Petition for writ of certiorari filed.
Nov 27 1985	Order extending time to file response to petition until January 6, 1986.
Nov 27 1985	Brief amicus curiae of Livestock Marketing Association filed.
Dec 30 1985	Brief amicus curiae of National Council of Farmer Cooperatives filed.
Jan 7 1986	Brief of respondent United States in opposition filed.
Jan 13 1986	Reply brief of petitioner MO Farmers Association, Inc. filed.
Jan 15 1986	DISTRIBUTED. February 21, 1986
Feb 24 1986	REDISTRIBUTED. February 28, 1986
Mar 3 1986	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

1pp

85-727 (1)

No. .....

In The

Supreme Court of the United States

October Term, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WAYNE H. HOECKER
JOSEPH A. COLUSSI
(Counsel of Record)
GAGE & TUCKER
2345 Grand Avenue
Post Office Box 23428
Kansas City, Missouri 64141
(816) 474-6460

Counsel for Petitioner

Of Counsel for Petitioner:

JAMES T. MALYSIAK
FREEMAN, FREEMAN & SALZMAN, P.C.
Suite 2700
401 North Michigan Avenue
Chicago, Illinois 60611
(312) 222-5100

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

48 pp

QUESTION PRESENTED

Whether the Eighth Circuit's refusal to apply the Uniform Commercial Code, as incorporated federal law governing Farmers Home Administration security interests, conflicts with this Court's unanimous decision in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and resurrects and perpetuates the conflict among the circuits which *Kimbell Foods* sought to resolve.*

---

* The caption of the case contains the identity of all interested parties. Pursuant to Supreme Court Rule 28.1, petitioner states that it is a membership cooperative corporation. Its members are producers of agricultural goods on farms located in Missouri, Iowa and Arkansas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

No. .....

In The

Supreme Court of the United States

October Term, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Nature of the Case

This case was filed by the United States on behalf of the Farmers Home Administration ("FmHA") of the United States Department of Agriculture under 28 U.S.C. § 1345 claiming that petitioner, Missouri Farmers Association, Inc. ("MFA"), was liable for conversion because it had purchased crops from FmHA debtor Edward Stoops in violation of FmHA's security interest.

This case turns on the choice of law to be applied. Because FmHA had authorized the sale, under the Uniform Commercial Code ("UCC") its security interest in the

crops was extinguished and MFA would not be liable for conversion even though Stoops had not remitted the sales proceeds to FmHA.[1] However, if FmHA's regulations, as interpreted by the agency, are applied, its lien on the crops continued until it received the proceeds, and thus MFA would still be liable for conversion despite having paid Stoops in full.

The Eighth Circuit held that the UCC would not be applied because FmHA would then lose and that a loss for FmHA is a result not in "the federal interest."

Statement of Facts

The facts are undisputed. Edward Stoops began borrowing money in 1974 from the FmHA for operating expenses on his livestock and row crow farm in Missouri.

---

[1]See Mo. Rev. Stat. § 400.9-306(2) (1978); *Charterbank Butler v. Central Cooperatives, Inc.*, 667 S.W.2d 463 (Mo. App. 1984).

See also, Parkersburg State Bank v. Swift Independent Packing Co., 764 F.2d 512 (8th Cir. 1985); *First National Bank and Trust Co. of Oklahoma City v. Iowa Beef Processors, Inc.*, 626 F.2d 764 (10th Cir. 1980); *Moffat County State Bank v. Producers Livestock Marketing Ass'n*, 598 F. Supp. 1562 (D. Colo. 1984); *United States v. Lindsey*, 455 F. Supp. 449 (N.D. Tex. 1978); *United States v. Central Livestock Ass'n*, 349 F. Supp. 1033 (D.N.D. 1972); *In Re Caldwell*, CCH Sec. Trans. Guide, ¶ 51,762 (E.D. Cal. 1970); *People's National Bank & Trust Co. v. Excel Corp.*, 236 Kan. 687, 695 P.2d 444 (Kan. 1985); *Humboldt Trust Savings Bank v. Entler*, 349 N.W.2d 778 (Iowa 1984); *Ottumwa Production Credit Ass'n v. Heinhold Hog Market, Inc.*, 340 N.W.2d 801 (Iowa App. 1983); *State Bank, Palmer v. Scoular-Bishop Grain Co.*, 349 N.W.2d 912 (Neb. 1984); *Anon, Inc. v. Farmers Production Credit Ass'n of Scottsburg*, 446 N.E.2d 656 (Ind. App. 1983); *National Livestock Ass'n Credit Corp. v. Schultz*, 653 P.2d 1243 (Okla. App. 1982); *Planter's Production Credit Ass'n v. Bowles*, 511 S.W.2d 645 (Ark. 1974); *Central Washington P.C.A. v. Baker*, 521 P.2d 226 (Wash. 1974).

As part of a 1980 FmHA liquidation plan, Stoops was expressly instructed in writing, by a letter from the FmHA State Director and annual FmHA farm and home plans, and also orally, by the FmHA county supervisor, to sell his livestock and row crops when he deemed the market for those farm products to be most favorable.

Stoops followed the directions of the FmHA and sold crops to MFA between March and July of 1980. MFA paid Stoops in full. Stoops did not remit the proceeds to FmHA but instead used the money to pay operating expenses and feed his family. Three years later, the FmHA sued MFA and others for conversion.

MFA defended on the ground that FmHA's written and oral instructions to Stoops to sell his crops to MFA were an "authorization" to sell under UCC § 9-306(2) which cut off the security interest in those crops. *See* Mo. Rev. Stat. § 400.9-306(2)(1978). Both the District Court and the Court of Appeals acknowledged that the sales were authorized, but declined to apply UCC § 9-306(2). Rather, both courts applied a FmHA internal administrative regulation, 7 C.F.R. § 1962.17, which generally provides that the FmHA can take no action to its financial detriment[2] and that the FmHA lien continued on

---

[2]The FmHA regulation provides that "chattel security may be released only when release will not be to the financial detriment of FmHA." 7 C.F.R. § 1962.17 (1985). Obviously, with a regulation as broadly drafted as § 1962.17, FmHA seeks never to be held responsible for its commercial decisions.

A federal district court in *United States v. Central Livestock Corp.*, — F. Supp. — (D. Kan. 1985) (App. G), recently explained and rejected FmHA's contention that § 1962.17 must apply so that the agency always wins. The Court stated:

(Continued on following page)

the collateral until the proceeds are properly applied, notwithstanding contrary UCC principles.

Course of Proceedings

This matter was initially filed by the United States in 1983 for conversion of crops. After a bench trial, the District Court ordered judgment entered in favor of the United States for $32,014.90, the full purchase price of the crops which MFA had already paid once to Stoops. *United States v. Missouri Farmers Ass'n Inc.*, 480 F. Supp. 35 (E.D. Mo. 1984) (App. A.). On May 29, 1984 the District Court denied MFA's request for postjudgment relief. (Slip Opinion of May 29, 1984) (App. B.).

A notice of appeal to the Eighth Circuit court of Appeals was filed by MFA on February 24, 1984. On February 1, 1985, the Eighth Circuit issued a three paragraph *per curiam* opinion affirming the District Court. *United States v. Missouri Farmers Ass'n, Inc.*, 764 F.2d 488 (8th Cir. 1985 (App. C.).

(Continued from previous page)

7 C.F.R. § 1962.17 (1985) is merely a program regulation addressing the circumstances in which FmHA officers and agents have the authority to affirmatively release security interests. It does not purport to, and cannot be interpreted to, govern the priorities of FmHA security interests and competing interests acquired under state commercial law. To read that regulation in the manner plaintiff urges would mean not only that state commercial law could *never* apply when the result would be detrimental to the FmHA, but as well, that on the merits the agency would always prevail, without regard for the status and rights of the competing party under state law. Clearly, the Department of Agriculture could not have dictated that result, nor did it intend to in the regulation on which plaintiff relies.

App. G at App. 26 (Emphasis in original).

Because the Court of Appeals had not addressed the critical UCC "authorization" question, even though it had been fully briefed and argued, MFA petitioned for rehearing. Rehearing by the panel was granted on March 28, 1985 (App. D.).

In a second *per curiam* opinion issued on June 17, 1985, the Court of Appeals admitted that FmHA's security interest in the crops would be cut off if UCC § 9-306(2) was applied as the federal rule of decision. The Court of Appeals, however, while acknowledging that this Court in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) had held that state law "could" be adopted as the federal law governing FmHA security interests, ruled that "[a]doption of state law in this case would conflict with the federal interests present in the FmHA loan program." 764 F.2d at 489. It therefore applied FmHA's own regulations, found MFA liable for conversion and reinstated its *per curiam* order of February 1, 1985. *United States v. Missouri Farmers Ass'n, Inc.*, 764 F.2d 488 (8th Cir. 1985) (App. E.).

On June 28, 1985 MFA filed its suggestions for rehearing by the circuit court *en banc*. Its suggestions were denied without opinion on August 8, 1985. (App. F.).

Summary of Argument

The Eighth Circuit's decision rejecting the UCC and applying FmHA's own self-serving regulations conflicts with this Court's unanimous decision in *Kimbell Foods*. *Kimbell Foods* found that Congress had intended FmHA to be subject, like private creditors, to state commercial law. No federal interest could be undermined by apply-

ing the age-old rule, adopted by UCC § 9-306(2), that collateral sales authorized by the secured party cannot be the basis for a conversion action against the purchaser. To the contrary, the Eighth Circuit's unfair ruling, imposing liability without fault and granting FmHA a windfall, has recreated a conflict among the circuits, denied Congressional intent to subject FmHA to the discipline of the marketplace, placed undue and unfair burdens on interstate commerce in agricultural products, and created confusion as to the applicable legal rules in the hundreds of pending FmHA cases.

—o—

ARGUMENT

Reasons Why the Petition Should Be Granted

1. The Eighth Circuit Erroneously Failed to Follow Kimbell Foods.

For many years prior to this Court's *Kimbell Foods* decision, the circuits had been split over whether FmHA security interests were to be governed by state law incorporated as federal law or instead by separate federal common law giving priority to the federal liens. *See Kimbell Foods*, 440 U.S. at 726 and n.16.[3] Finally, in *Kimbell Foods*,

[3]As observed by a leading commentator on this subject:

> Until 1979, there was a split among the circuits as to whether federal law or Article 9 of the UCC should control in determining the priority of the United States as a secured lender competing with bona fide purchasers of farm products. At least four circuit courts of appeals held, un-

(Continued on following page)

the conflict was resolved by this Court's holding that, while *federal* law governs disputes involving FmHA security interests, a uniform national rule was *not* necessary to protect the federal interest, and thus nondiscriminatory *state* law would be adopted as federal law, absent a congressional directive to the contrary.

As a leading commentator observed, *Kimbell Foods* had apparently settled the choice-of-law controversy once and for all:

> *Kimbell Foods* instructs the federal courts to resolve the priority conflict within the confines of state commercial law and not according to some external law that would automatically give priority to the federal lending agency.

B. Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*, ¶ 8.4[3][d] at 8-34 (1980).

But now the Eighth Circuit has undone *Kimbell Foods'* conflict resolution and created even greater uncertainty than in the pre-*Kimbell Foods* era. Seizing upon this Court's comment in *Kimbell Foods* that special rules might be necessary "to vindicate important national interests", 440 U.S. at 740, the Eighth Circuit, in two sentences and

(Continued from previous page)

> der pre-UCC law, that the United States as secured party under a federal credit program had priority as a matter of *federal* law over an auctioneer who sells livestock without knowledge of the secured party's lien [citing cases from the Third, Sixth, Ninth, and Tenth Circuits]. Two circuits [Fourth and Eighth] held that such a priority conflict should be determined under *state* law.

B. Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*, ¶ 8.4[3][d] at 8-34 (1980) (emphasis in original).

without any specific explanation of the important national interests at stake or how the UCC result could possibly harm them, threw *Kimbell Foods* out and applied FmHA's one-sided regulations. The Court of Appeals thus failed to heed this Court's own admonition in *Kimbell Foods* not to create a "national interest" loophole to evade the UCC:

> [N]either the Government nor the Court of Appeals advanced any concrete reasons for rejecting well-established commercial rules which have proven workable over time.

440 U.S. at 740. The same is true here, and the Eighth Circuit's inexplicable decision to elude *Kimbell Foods* so that the FmHA can gain windfall damages from an honest, innocent farm business must be reversed to reestablish *Kimbell Foods* as the law of the land.

2. The Eighth Circuit Has Spawned New Conflict Among the Circuits.

After *Kimbell Foods* was decided, the Fourth, Fifth, Eighth, Ninth and Eleventh Circuits faithfully followed it and applied the UCC as federal law in FmHA cases. *See United States v. Public Auction Yard,* 637 F.2d 613, 614-615 (9th Cir. 1980); *United States v. Southeast Miss. Livestock Farmers Ass'n,* 619 F.2d 435, 436-437 (5th Cir. 1980); *United States v. Friend's Stock Yard, Inc.,* 600 F.2d 9, 10 (4th Cir. 1979). *See also Johnson v. United States Dept of Agriculture,* 734 F.2d 774 (11th Cir. 1984); *United States v. Kukowski,* 735 F.2d 1057 (8th Cir. 1984). However, the Eighth Circuit in this case and the Third Circuit in *United States v. Kennedy,* 738 F.2d 584, 586-587

and nn.4 and 5 (3rd Cir. 1984), refused to apply the UCC in contested FmHA cases, thus creating a new conflict.[4]

Because there are literally hundreds of pending FmHA conversion actions across the nation, this intercircuit conflict is breeding new uncertainty and causing unnecessary legal expense, burdens on the judiciary, and unfair damage awards. Immediate action by this Court is required to resolve the conflict and impart a clear message to the lower courts that Supreme Court holdings are to be followed and not evaded through verbal loopholes.

3. The True National Interest Requires Reversal and Application of the UCC's Fair Rules.

The Eighth Circuit explained its choice of FmHA's regulations instead of the UCC as the governing law as follows:

> (1) FmHA's regulations allow authorized sales of collateral without release of the lien.
>
> (2) Under the Missouri UCC, authorized sales result in loss of the lien on the collateral.
>
> (3) *Kimbell Foods* adopted state law except where it would conflict with "federal interests".

---

[4]The Third Circuit's rationale for avoiding *Kimbell Foods* in the *Kennedy* case differed from the Eighth Circuit's. The Third Circuit fallaciously explained *Kimbell Foods* as adopting state law only in the absence of preexisting federal law. According to the *Kennedy* court, *United States v. Sommerville,* 324 F.2d 712 (3rd Cir. 1963), supplied federal law in the Third Circuit before *Kimbell Foods* and thus survived it. This rationale inexplicably ignored the fact that *Sommerville's* holding that the UCC did not apply in FmHA cases was emphatically *rejected by Kimbell Foods.* Indeed, *Sommerville* was one of the decisions on the "losing" side of the conflict which *Kimbell Foods* resolved.

> (4) Adoption of the UCC would "nullify part of the FmHA regulations and interfere with an important objective of the FmHA loan program, *i.e.*, allowing farmers to continue their farm operations".

764 F.2d at 489.

This argument is question-begging in that it initially assumes that the FmHA regulation should apply and accepts the very FmHA arguments which this Court repeatedly rejected in *Kimbell Foods*. There, too, FmHA argued that it needed a special priority to fulfill the aims of its programs and to recover its loaned funds, but this Court emphatically refuted those contentions because it found that Congress had the specific purpose of subjecting FmHA to the same legal principles and market forces facing private creditors so that the agency would have economic incentives to make and manage its loans prudently:

> Congress' admonitions to extend loans judiciously suggests the view that it did not intend to confer special privileges on agencies that enter the commercial field.

440 U.S. at 737. Thus, FmHA now seeks to avoid *Kimbell Foods* to escape those very market pressures and incentives to which Congress intended to subject the agency. The Eighth Circuit has committed a significant disservice to the national interest by providing legal rationale for such avoidance.

Moreover, the Eighth Circuit's fear that applying the UCC here would somehow interfere with the FmHA objective of allowing farmers to continue with their farming operations is unfounded and false. These conversion cases deal with farmer-debtors who have defaulted and gone

bankrupt, and who clearly will not continue farming, in any event, under a FmHA program. This litigation represents nothing more than FmHA's efforts to recover its loan losses from the pocket, however deep or shallow, of any party which had some innocent involvement in the sale of collateral. The Eighth Circuit's holding that FmHA can never lose in litigation is a result which stands *Kimbell Foods* on its head.

Indeed, as this Court ruled in 1979, requiring FmHA to deal with the market forces which private lenders face will encourage the agency to supervise its debtors more closely and perhaps keep more farmers on their land than under the current system which encourages FmHA officers to believe that the costs of their mistakes or inaction will be borne by other parties. 440 U.S. at 734-737.

—o—

CONCLUSION

This Court in *Kimbell Foods* held that the UCC would apply in FmHA cases unless Congress directed otherwise because Congress wanted to strip FmHA of the notion that "the sovereign always wins." Congress has not changed the *Kimbell Foods* holding, yet the Eighth Circuit has chosen to defy both this Court and Congress to provide special protection to a federal agency at the expense of an innocent third party who would be blameless under the prevailing commercial law.[5]

---

[5]FmHA has persisted in bringing hundreds of these cases despite a federal judge's conclusion in 1978 that such cases were "unconscionable":

(Continued on following page)

Petitioner therefore asks the Court to grant the petition and to reverse the Eighth Circuit's perverse and anomalous decision.

Respectfully submitted,

WAYNE H. HOECKER
JOSEPH A. COLUSSI
(Counsel of Record)

GAGE & TUCKER
2345 Grand Avenue
Post Office Box 23428
Kansas City, Missouri 64141
(816) 474-6460

Counsel for Petitioner

Of Counsel for Petitioner:

JAMES T. MALYSIAK
FREEMAN, FREEMAN & SALZMAN, P.C.
Suite 2700
401 North Michigan Avenue
Chicago, Illinois 60611
(312) 222-5100

(Continued from previous page)

> The government's position distilled down is that every sale is a technical breach of the security agreement and a technical conversion. If, however, everything goes smoothly and the proceeds are applied correctly, then and only then will FmHA magnanimously grant its ex post facto consent. * * * It would be unconscionable to allow FmHA, on the one hand, to require a borrower to cull cattle or else be in violation of the security agreement and, at the same time, to call every sale a conversion with everyone connected potentially liable.

United States v. Lindsey, 455 F. Supp. 449, 456-457 (N.D. Tex. 1978).

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-860C(B)

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MISSOURI FARMERS ASSOCIATES, INC.,
Defendant,
vs.
EDWARD V. STOOPS, JR., et al,
Third-Party
Defendants.

MEMORANDUM AND ORDER

(Filed February 3, 1984)

In the case before us the United States seeks to recover $32,014.90 from the Missouri Farmers Association (MFA) for crops purchased from Edward Stoops which were subject to a security agreement in favor of the Farmers Home Administration (FmHA). MFA, as third-party plaintiff, asserts a claim for indemnification against Edward Stoops, third-party defendant.

Prior to trial the parties stipulated that Edward Stoops and his wife Barbara operated a farm in Chariton, Missouri. From February 1978 through April 1979 they received $70,630.00 in loans from the FmHA, with an outstanding balance of $67,926.00 on the date of trial. As

part of the loan agreement, Edward and Barbara Stoops executed financial statements covering their crops and other farm equipment and filed these statements in the Chariton County Recorder's Office. In 1979 and 1980, the Stoops' financial condition worsened and they defaulted on their notes. During the period from March 1, 1980 through July 1, 1980, MFA purchased crops covered by the financing statements from Edward Stoops for $32,014.90. None of these sale proceeds were paid to plaintiff.

As a defense to plaintiff's allegations of conversion, MFA contends that FmHA did not have an enforceable security interest in Stoops' crops since there was no granting clause in the security agreement between Stoops and FmHA. The parties stipulated that the security agreement, which was executed on a standardized FmHA form, did not contain specific words granting plaintiff a security interest in Stoops' crops. Contrary to defendants' assertions, however, no precise words are required by the Uniform Commercial Code to create an enforceable security interest.

Section 400.9-203(1)(b) Mo. Rev. Stat. and the official comments to that section make it clear that the only requirements needed to create an enforceable security interest are: 1) a writing; 2) the debtor's signature; and 3) a description of the land where the crops are located. The document signed by the Stoops clearly states on its face that it is a security agreement and it is replete with references to the "security agreement" between the "Secured Party" (FmHA) and the "Debtor" (Stoops). Moreover, the agreement describes in detail the equipment covered by the security agreement and the land where the crops are located. The liberal requirements of the Code for cre-

ating an enforceable security agreement have been met. Accordingly, we hold that there was an enforceable security interest in the crops purchased by MFA.

MFA further contends that FmHA waived any security interest it had in Stoops' crops by implicitly authorizing the sales to MFA. To support this defense MFA outlines a course of conduct between Stoops and FmHA dating back several years whereby Stoops would sell his crops without the written authorization required by the security agreement and then FmHA would approve these sales "after-the-fact" by accepting the proceeds of the sale. This "after-the-fact" approval, according to MFA, amounts to a waiver of the security interest in Stoops' crops.

We note initially that the evidence MFA produced at trial outlined a series of unauthorized sales by Stoops and "after-the-fact" approvals by FmHA. However, of all the specific instances where Stoops obtained "after-the-fact" approval from FmHA, MFA was never a buyer of the farm products or equipment in question. Consequently, MFA cannot now contend that FmMA waived its security interest in the crops MFA purchased from Stoops.

Moreover, MFA cites no Missouri cases, and we know of none, which supports the waiver defense FMA proffers. The undisputed evidence shows that FmHA never provided Stoops with written consent to sell the crops as required by the security agreement and that Stoops never paid the proceeds of the sale to FmHA. MFA's defense that the government released its lien by "after-the-fact" approvals is unsound because under Missouri law a conversion occurred each time the crops were sold without written authorization, but the agency waived liability by

accepting the proceeds of the sale. *U.S. v. Gallatin Livestock Auction, Inc.*, 448 F.Supp. 616 (W.D.Mo 1978), affirmed 589 F.2d 353 (8 Cir. 1978).[1] Accordingly, we hold that the government did not release its lien on Stoops' crops, and consequently defendant is liable to plaintiff in the amount of $32,014.90.

Still remaining is MFA's claim against Stoops for indemnification. MFA's third-party complaint states that Stoops had a duty to inform MFA of any lien on his crops, that Stoops breached this duty and that Stoops' failure to inform MFA was wilful and intended to mislead MFA. Stoops, however, was precluded from presenting any evidence at trial because he failed to comply with pre-trial orders and MFA neglected to proffer any evidence in support of its claim against Stoops. Consequently, MFA did not sustain its burden of proof on its claim against Stoops, so we hereby find in favor of third-party defendant Stoops on MFA's claim.

The foregoing memorandum constitutes our findings of fact and conclusions of law. Judgment will be entered in accordance herewith.

Dated this 3rd day of February, 1984.

/s/ John K. Regan
United States District Judge

---

1 We also note that while Missouri law applies to this transaction, federal regulations governing the release of FmHA liens are narrowly drawn to maintain the government's security interest in the proceeds from the sale of the collateral. See 7 C.F.R. § 1962.17(b). (1983).

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-860C(B)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MISSOURI FARMERS ASSOCIATES, INC.,
Defendant,

vs.

EDWARD V. STOOPS, JR., et al,
Third-Party
Defendants.

J U D G M E N T
(Filed February 3, 1984)

The Court having this day entered its MEMORANDUM AND ORDER, herein,

NOW THEREFORE, in accordance therewith and for the reasons therein stated,

IT IS HEREBY ORDERED and ADJUDGED

(1) That plaintiff United States of America have and recover of and from defendant Missouri Farmers Associates, Inc. damages for conversion in the sum of $32,014.90, and

(2) That defendant and third-party plaintiff Missouri Farmers Associates, Inc. recover nothing from third-party defendant Edward V. Stoops, Jr.

Dated this 3rd day of February, 1984.

/s/ John K. Regan
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 83-860C(B)

UNITED STATES OF AMERICA,

Plaintiff,

vs

MISSOURI FARMERS ASSOCIATION, INC.,

vs

EDWARD V. STOOPS, JR., et al.

ORDER

(Filed May 29, 1984)

This matter is before the Court on motion of defendant Missouri Famers Association (MFA) for relief from this Court's judgment order entered February 3, 1984, finding MFA liable to the United States for conversion. A non-jury trial was held in this matter on December 6, 1983.

This action stemmed from defendant's purchase of crops from Edward Stoops (third-party defendant) which were subject to a security interest in favor of the United States (through the Farmers Home Administration). The validity of the plaintiff's security interest and the alleged waiver of that security interest by plaintiff were hotly contested issues at trial. This Court found, however, that the security interest was valid and that the plaintiff did not waive its security interest in the crops bought by MFA. Accordingly, judgment was entered in favor of plaintiff.

MFA now contends that it is entitled to relief from that judgment pursuant to F.R.C.P. 60(b)(3) because the plaintiff intentionally withheld requested documents from MFA which, allegedly, prove that plaintiff's security interest was unenforceable. MFA advanced the theory at trial that because the security agreement between FmHA and Stoops did not have a specific "granting clause", the agreement did not create an enforceable security interest. During discovery MFA requested the production of all standardized security agreements used by FmHA both prior to and subsequent to the agreement between FmHA and Stoops. In addition, MFA requested any circulars and memorandum between FmHA and its divisional offices referring to the absence of the granting clause in the standardized security agreements. The government responded to MFA's request with certain documents but MFA contends that some memorandum and correspondence were intentionally withheld which revealed the government's belief that the security interests were invalid. Furthermore, MFA contends that the government intentionally misrepresented to this Court that said discovery requests were fully complied with.

Citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5 Cir. 1978), MFA asserts that the government's failure to produce these documents entitles it to relief under Rule 60(b)(3) as a matter of law, and in accordance therewith, requests us to vacate our judgment. After reviewing the *Rozier* case we have concluded that although it defines the application of Rule 60(b)(3), it does not mandate the relief sought by MFA.

Rozier holds that one who asserts that an adverse party has obtained a verdict through fraud, misrepresenta-

tion or other misconduct has the burden of proving that assertion by clear and convincing evidence. In addition, the conduct complained of must be such that it prevented the losing party from fully and fairly presenting his case or defense. *Rozier,* supra at 1339. In *Rozier,* plaintiff sued the defendant Ford Motor Company for negligently designing an automobile fuel tank. During discovery Ford withheld a "trend cost estimate" document which was one of a group of documents plaintiff requested. The Court found that Ford engaged in misrepresentation and other misconduct by failing to disclose this document. Moreover, the Court felt that the nondisclosure prevented the plaintiff from fully and fairly presenting her case since the absence of these documents inevitably influenced her decision as to which theory she would proceed on at trial. The Court concluded that disclosure of the trend cost estimate would have made a difference in the way plaintiff's counsel approached the case.

In this case at bar, however, MFA's defense was not altered by the absence of the documents in question. MFA still proceeded at trial with the theory that the absence of the granting clause in the security agreement vitiated its enforceability. The Court considered MFA's theory but concluded that the security agreement was enforceable despite the absence of the granting clause. MFA concedes in its brief that the only significance the missing documents have is that they demonstrate the government's concern over the missing granting clause. Although we disagree with MFA's characterization that the government believed the security interests were unenforceable, whether or not the government believed the security interests were valid is irrelevant. The enforceability of security interests is determined by looking at the face of the security agreement, and beliefs or expectations of the parties about the validity of the security interests are immaterial. Section 400.9-203 RSMo. (1978).

This Court analyzed the security agreement between Stoops and FmHA in the judgment order of February 3, 1984, and will not do so again here. The parties stipulated before trial that the security agreement did not contain a granting clause and this point was emphasized repeatedly at trial by counsel for MFA. The issue of whether the security agreement was enforceable without the granting clause was fully presented to the trier of fact for determination. Any documents revealing a belief by the government that the absence of the granting clause affected the enforceability of the security agreement would have been wholly irrelevant and inadmissible at trial. Fed.R. Evid.402. We find, therefore, that MFA had an opportunity to fully and fairly present its defense; consequently, it is unnecessary for us to decide whether MFA has sustained its onerous burden of proving whether the government engaged in misrepresentation and other misconduct.

MFA also contends that its discovery of additional documents entitles it to relief from this Court's judgment pursuant to Rule 60(b)(2), which permits relief on the basis of newly discovered evidence. Relief will only be granted, however, if the newly discovered evidence is such that a new trial would produce a new result. *Rozier,* supra at 1339. The documents which MFA claims as newly discovered evidence, are, as we discussed earlier, irrelevant to the issue of the enforceability of the security agreement. Consequently, the documents in question would not change

our decision in any respect. Therefore, MFA is not entitled to relief from our judgment under Rule 60(b)(2).

Finally, MFA urges us to reconsider our ruling on the invalidity of its "waiver" defense by considering a recent Missouri Court of Appeals case, *Charterbank Butler v. Central Cooperatives,* No. 34442 (Mo.App. filed March 13, 1984). In *Charterbank,* the plaintiff bank which held a security interest in a debtor's soybeans sued the defendant (a local grain elevator) for conversion of the debtor's soybeans. The bank had a policy of allowing its debtors to sell the encumbered grain and then account to the bank with the proceeds of the sale. However, when the debtors failed to account to the plaintiff with the proceeds of the sale to the defendant, the bank initiated a conversion action against defendant. The trial court entered a judgment for the plaintiff, but the Court of Appeals reversed, holding that the bank, by allowing the debtors to sell their collateral, waived its security interest notwithstanding its attempt to condition such authorization upon payment of proceeds to the bank.

While we agree that the *Charterbank* case lends credence to MFA's waiver defense, the case is factually distinguishable from the instant case. The secured creditor herein is the Farmers Home Administration and, as our judgment order indicates, the release of any lien held by the FmHA is determined in conjunction with federal law. For that reason, *U.S. v. Gallatin Livestock Auction, Inc.,* 448 F.Supp. 616 (W.D.Mo. 1978), which concerns the waiver of FmHA liens (and which we cited in our memorandum order), is dispositive of the issues in this case. We decline, therefore, to alter our ruling of February 3, 1984.

Accordingly, IT IS HEREBY ORDERED that defendant MFA's motion for relief be and the same is hereby OVERRULED.

Dated this 29 day of May, 1984.

/s/ John K. Regan
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1272

United States of America,

Appellee,

v.

Missouri Farmers Association, Inc., d/b/a M.F.A. Grain Marketing Division and M.F.A. Exchange,

Appellant,

Edward V. Stoops and Barbara A. Stoops,

Third-Party Defendants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 15, 1984

Filed: February 1, 1985

Before BRIGHT, McMILLIAN, and BOWMAN, Circuit Judges.

PER CURIAM.

The Missouri Farmers Association, Inc. (MFA) appeals from a decision of the district court finding it liable for the conversion of crops in which the United States, through the Farmers Home Administration (FmHA), claimed a security interest. For reversal MFA contends that the district court erred in failing to find that (1) FmHA's security interest in the crops had been cut off when it expressly authorized sale of the crops to MFA, and (2) the language in the security agreement covering these

crops was not sufficient to create a security interest. MFA also asserts that the district court should have granted its Rule 60(b) request for postjudgment relief.

The facts reveal that Missouri farmer Edward V. Stoops executed several security agreements with FmHA covering certain crops and livestock. Stoops filed financing statements in the county recorder's office. FmHA later instructed Stoops to sell crops covered by the security agreements and deliver the proceeds to FmHA. Stoops sold the crops to MFA, but paid none of the proceeds to the agency. FmHA then sued MFA for conversion of the crops. The district court made rulings adverse to MFA and entered judment in favor of FmHA in the sum of $32,014.90. Specifically, the court concluded that the language of the security agreements was sufficient to create an enforceable security interest in favor of FmHA, and that FmHA did not waive its interests in the crops purchased by MFA. MFA filed a posttrial motion for relief from the judgment, pursuant to Fed. R. Civ. P. 60(b), alleging that the government had failed to comply with a discovery order, thus preventing MFA from fairly presenting its case. The district court denied this motion and affirmed the judgment. MFA has appealed from the adverse judgment and the denial of its posttrial motion.

We have carefully reviewed the record and, finding no mistake of fact or law, affirm the judgment on the basis of the trial court's memorandum and order. *United States v. Missouri Farmers Association, Inc.*, 580 F. Supp. 35 (E.D. Mo. 1984). Furthermore, our review of the record indicates that the district court did not abuse its discretion in denying relief to appellant MFA under Fed. R. Civ. P. 60(b).

Accordingly, the judgment of the district court is affirmed. *See* 8th Cir. R. 14.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1272

United States of America,

Appellee,

vs.

Missouri Farmers Association, Inc., d/b/a M.F.A. Grain Marketing Division and M.F.A. Exchange,

Appellant,

Edward V. Stoops and Barbara A. Stoops,

Third-Party Defendants.

Appeal from the United States District Court for the Eastern District of Missouri

Filed: March 28, 1985

Before BRIGHT, McMILLIAN, and BOWMAN, Circuit Judges.

The panel grants a rehearing in the above-captioned appeal. The opinion of February 1, 1985, is rescinded. The rehearing will be scheduled during the May session of the Court in St. Paul, Minnesota.

The issue on rehearing is whether the government regulations governing sale of chattels subject security agreements (FmHA regulations §§§ 1962.17, 1962.17(b) and 1962.18(b), or any other regulations) apply to preserve the government's liens against the defendant-appellant, Missouri Farmers Association, the purchaser of the chattels in question.

Amicus Curiae Livestock Marketing Association may file a brief not to exceed ten pages of text material, such brief to be filed within 15 days. Appellant may file a supplemental brief not to exceed ten pages of text, also within 15 days. The government may respond within 15 days thereafter by a brief limited to 15 pages of supplemental text.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1272

United States of America,

Appelleee,

v.

Missouri Farmers Association, Inc., d/b/a M.F.A. Grain Marketing Division and M.F.A. Exchange,

Appellant,

Edward V. Stoops and Barbara A. Stoops,

Third-Party Defendants.

Appeal from the United States District Court of
the Eastern District of Missouri.

Filed: June 17, 1985

Before BRIGHT, McMILLIAN, and BOWMAN, Circuit Judges.

ORDER ON PETITION FOR REHEARING

On the petition of appellant, Missouri Farmers Association, Inc. (MFA), we granted rehearing by the panel. MFA argues that, under state law, a security interest asserted by the Farmers Home Administration (FmHA) was ineffective because FmHA had authorized a sale of the collateral. MFA's argument depends upon the application of state law to the release of FmHA's security interest. MFA recognizes that, under FmHA regulations, the security interest has not been released. Therefore, the issue

on rehearing is whether state commercial law or FmHA regulations govern the release of FmHA's liens.

FmHA regulations clearly contemplate authorized sales of collateral without release of FmHA's lien.[1] These regulations are part of a detailed scheme that divides collateral into separate classes and permits the release of security interests only for specified purposes, which differ for each class. 7 C.F.R. § 1962.17 (1985). The regulations take into consideration the unique needs of FmHA's farmer-borrowers. They give the borrowers needed flexibility to conduct their farming operations while protecting the government's interests in the collateral—here, soybeans and grain.

Missouri law, on the other hand, provides that a secured creditor's consent to the sale of collateral automatically terminates the security interest, even if the consent is given conditionally. *CharterBank Butler v. Central Cooperatives, Inc.*, 667 S.W.2d 463, 465-66 (Mo. App. 1984). Application of Missouri law would therefore nullify part of the FmHA regulations and interfere with an important objective of the FmHA loan program, i.e., allowing farmers to continue their farm operations.

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1978), the Supreme Court stated that "federal law gov-

---

[1] 7 C.F.R. § 1962.17(b) (1985) provides:

* * * When borrowers sell security, the sale will be made subject to the FmHA lien. The property and proceeds will remain subject to the lien until * * * the sale is approved by the County Supervisor *and* the proceeds are used for one or more of the purposes stated in § 1962.17. (Emphasis added).

erns questions involving the rights of the United States arising under nationwide federal programs." *Id.* at 726. However, the Court also provided that state law could be adopted as the federal rule of decision so long as a national rule was not needed to protect the federal interests underlying the program. Adoption of state law in this case would conflict with the federal interests present in the FmHA loan program. Accordingly, we conclude that FmHA regulations, not state law, govern the release of FmHA liens. *See United States v. Farmers Cooperative Co.*, 708 F.2d 352, 353 n.2 (8th Cir. 1983).

The MFA also argues that our failure to adopt state law will disrupt commercial transactions in Missouri. We think these fears are unwarranted because a purchaser of farm products such as MFA can easily determine whether or not the goods are covered by a FmHA security interest and take appropriate steps to protect itself from liability.

We conclude that FmHA regulations rather than state commercial law govern the release of governmental security interests under the FmHA loan program. Therefore, we readopt the opinion in this case of February 1, 1985, and upon the basis of that opinion and this order, we affirm the judgment of the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 85-1065-K

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTRAL LIVESTOCK CORPORATION,

Defendant.

MEMORANDUM AND ORDER

(Filed August 26, 1985)

Plaintiff filed this suit seeking damages for defendant's conversion of certain livestock in which the Farmers' Home Administration (FmHA) held an allegedly perfected security interest. The Court's jurisdiction is provided in 28 U.S.C. § 1345. Defendant Central Livestock Corporation (Central) answered and raised a number of affirmative defenses, one of which denied the FmHA held a perfected security interest in the livestock. Central then filed a motion to dismiss under F.R.Civ.P. 12(b)(6), or in the alternative for summary judgment under F.R.Civ.P. 56, arguing the FmHA posesses only an unperfected security interest because its financing statement lapsed under K.S.A. 84-9-403(2). As a result plaintiff's interest is inferior to, and defeated by, the rights of defendant, a purchaser for value. The Court agrees.

The facts of this case, taken in the light most favorable to plaintiff, are as follows. At various times from

June, 1978, through February, 198', the FmHA loaned a total of $35,700.00 to Alan R. Allison. He executed promissory notes and granted the FmHA a security interest in various crops, livestock, farm machinery and other equipment. On May 22, 1978, the FmHA filed a financing statement covering this collateral with the Register of Deeds of Kiowa County, Kansas. At no time thereafter did the FmHA file any continuation statements.

Sometime in 1981, Allison sold to Central a number of boars, sows and pigs valued at $29,775.81. This livestock was subject to the FmHA's security interest. There is no evidence the agency was aware of, or consented to, the sale.

Allison defaulted on the FmHA loans, although plaintiff does not specify when that occurred. The present suit against Central, seeking damages for conversion, was filed January 23, 1985.

The first question raised by Central's motion to dismiss or for summary judgment is whether this Court should apply Article 9 of the Kansas Uniform Commercial Code, K.S.A. 84-9-101 *et seq.*, to determine the parties' rights. Plaintiff contends it should not, because the FmHA is a federal agency entitled to application of federal common law rather than state law.

Both parties rely on the Supreme Court's decision in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). *Kimbell Foods* was actually two consolidated cases. The first concerned two competing perfected security interests in the same personal property. The United States' lien secured a loan guaranteed by the Small Business Administration (SBA), while the private lien, arising from se-

curity agreements preceding the federal guarantee, secured advances made by a private corporation after the federal guarantee. Both security interests were perfected under Texas' Uniform Commercial Code, and the question was, which of the creditors had priority? In the second case, the FmHA perfected a security interest in certain crops and farm equipment by filing a standard FmHA financing statement with state officials. A private individual later acquired a lien under state law by retaining possession of the tractor after the borrower failed to pay repair bills. The borrower filed for bankruptcy and the government sought to obtain possession of the tractor. The question in that case was whether the adequacy of the description of the collateral in the FmHA financing statement was to be tested under state or federal law. *Kimbell Foods,* 440 U.S. at 718-725.

The Supreme Court phrased the common issue as "whether contractual liens arising from certain federal loan programs take precedence over private liens, in the absence of a federal statute setting priorities." *Kimbell Foods,* 440 U.S. at 718. Looking first to the government interests implicated by nationwide federal programs, the Court noted there was little question federal law governed cases involving the United States' rights arising under those programs. The more difficult question concerned the content of the federal law to be applied. The Court held that "absent a congressional directive, the relative priority of private liens and consensual liens arising from these Government lending programs is to be determined under non-discriminatory state laws." *Id.* at 740.

In reaching that decision the Court looked at the need for uniform controlling rules in these cases, the degree

to which application of state law would frustrate specific objectives of the federal programs, and whether application of a federal rule would disrupt commercial relationships predicated on state law. On all three points the Court concluded state commercial codes furnish convenient solutions as well as arequate protection of federal interests. *Kimbell Foods,* 440 U.S. at 728-729. Adoption of a uniform federal law was unnecessary because both the SBA and the FmHA regulations mandate compliance with state law and procedures for "perfecting *and maintaining* valid security interests. . . ." *Id.* at 731 (emphasis added).

> Thus, the agencies' own operating practices belie their assertion that a federal rule of priority is needed to avoid the administrative burdens created by disparate state commercial rules. The programs already conform to each State's commercial standards. By using local lending offices and employees who are familiar with the law of their respective localities, the agencies function effectively without uniform procedures and legal rules.

Kimbell Foods, 440 U.S. at 732. Application of state law will not frustrate the specific objectives of the loan programs because the government is in substantially the same position as private lenders. Finally, the Court concluded application of a different federal rule would seriously disrupt commercial relationships established under state law.

> Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence.
>
> Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, we hesitate to create new uncertainties, in the

> absence of careful legislative deliberation. Of course, formulating special rules to govern the priority of the federal consensual liens in issue here would be justified if necessary to vindicate important national interests. But neither the Government nor the Court of Appeals advanced any concrete reasons for rejecting well-established commercial rules which have proven workable over time. *Thus, the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.*

Id. at 739-740 (emphasis added).

This Court cannot gainsay the following observations:

> The importance of *Kimbell Foods* cases is that federal lending agencies are clearly governed by the same rules which control the rights and duties of private secured parties. With respect to filing and perfection, priorities, and default provisions, federal agencies will be measured by the same standards as commercial banks, credit unions, finance companies, and, credit sellers. This means uniformity, which is the hallmark of the UCC. If Congress desires to establish a special rule to give protection to a federal lending agency, it may do so. At this writing, however, the only federal statutes which preempt Article I are . . . statutes geared to unique types of collateral rather than federal lending agencies as creditors. . . . *Kimbell Foods* reinforces the notion that Article 9 should continue as the paramount law of secured transactions unless Congress speaks out loudly.

Clark, The Law of Secured Transactions Under the Uniform Commercial Code, ¶ 1.8[1][g] (1980).

Following the *Kimbell Foods* decision a number of courts have applied state commercial law to resolve priority conflicts involving federal lending agencies. *See United States v. Lattauzio,* 748 F.2d 559 (10th Cir. 1984) (New

Mexico UCC applied in an SBA suit upon a guarantee of a government loan); *United States v. Southeast Miss. Livestock Farmers Ass'n,* 619 F.2d 435 (5th Cir. 1980) (Mississippi UCC applied to assess legal sufficiency of FmHA's security agreements and financing statements); *United States v. Burlington Industries,* 600 F.2d 517 (5th Cir. 1979) (Florida commercial law applied to determine priority between SBA security interest and competing warehouseman's lien); *United States v. S.K.A. Associates,* 600 F.2d 513 (5th Cir. 1979) (Florida non-UCC law allowed landlord's lien to prevail over SBA's Article 9 security interest); and *United States v. Oakley,* 483 F.Supp. 762 (D. Ark. 1980) (adequacy of description of collateral in FmHA's security agreement must stand or fall under Arkansas UCC). Notably, the only two cases to date which have relied on *Kimbell Foods* for the conclusion the respective federal interests involved demanded application of other than state law, have both concerned programs different from the FmHA and SBA lending operations. *See Jones v. Federal Deposit Ins. Corp.,* 748 F.2d 1400 (10th Cir. 1984) (FDIC regulations, rather than state law, adopted as uniform rule of federal law governing ownership of accounts on deposit); and *Marine Midland Bank v. United States,* 687 F.2d 395 (Ct.Cl. 1982) (resort to state law inappropriate in cases of priority of liens arising from government defense procurement contracts, the creation of which, unlike FmHA and SBA loans, generally does not follow individual state practices).

Plaintiff attempts to distinguish the present case from *Kimbell Foods,* arguing any constructive release of its security interest under state law would conflict with federal law contained in 7 C.F.R. § 1962.17 (1985), which pro-

vides that "[c]hattel security may be released only when release will not be to the financial detriment of FmHA." This Court has serious reservations about whether an administrative regulation is the sort of congressional proclamation the Supreme Court referred to in *Kimbell Foods.* But even assuming that in an appropriate case the Regulations of the Department of Agriculture, rather than nondiscriminatory state commercial law, might become the "federal rule of decision," that result is not justified here. 7 C.F.R. § 1962.17 (1985) is merely a program regulation addressing the circumstances in which FmHA officers and agents have the authority to affirmatively release security interests. It does not purport to, and cannot be interpreted to, govern the priorities of FmHA security interests and competing interests acquired under state commercial law. To read that regulation in the manner plaintiff urges would mean not only that state commercial law could *never* apply when the result would be detrimental to the FmHA, but as well, that on the merits the agency would always prevail, without regard for the status and rights of the competing party under state law. Clearly, the Department of Agriculture could not have dictated that result, nor did it intend to in the regulation on which plaintiff relies.

In another novel argument plaintiff contends K.S.A. 84-9-403 should not apply to this case because the statute imposes on the government the doctrine of laches. This argument misconstrues the nature of both that doctrine and this case.

Laches is an equitable device to bar stale claims in certain instances. *Perpetual Royalty Corp. v. Kipfer,* 253 F.Supp. 571 (D. Kan. 1965), *aff'd* 361 F.2d 317 (10th Cir. 1966), *cert. denied* 385 U.S. 1025 (1967). The question of laches is addressed primarily to the discretion of the court. *Russel v. Price,* 612 F.2d 1123 (9th Cir. 1979), *cert. denied sub nom Drebin v. Russell,* 446 U.S. 952 (1980). Equity will not act when there is an adequate remedy at law. *Record Head, Inc. v. Olson,* 476 F.Supp. 366 (D. N.D. 1979). Plaintiff has not sued under equity. The FmHA attempted to protect its interests under the Kansas UCC, and now brings suit under common law, seeking damages for conversion. Defendant has shown plaintiff simply failed to properly maintain its perfected security interest under Kansas law. Plaintiff's response, that the *statute* requiring that result wrongly imposes the *equitable* bar of laches, is inherently contradictory. Laches has nothing to do with statutory enactments; equity in that sense does not enter into this case. If it appears the absence of a remedy at law is due to plaintiff's failure to pursue that remedy, equity will not intervene. *Smaldone v. Kurtz,* 450 F.Supp. 1138 (D. D.C. 1978).

It is true that without a clear manifestation of congressional intent the United States is not bound by state statutes of limitation. *Cassidy Commission Co. v. United States,* 387 F.2d 875, 880 (10th Cir. 1967). But *Kimbell Foods* was nothing if not an invitation to Congress to respond to the principle the government is bound by both the substantive and procedural requirements of the UCC as adopted in the majority of states. Congress has not done so, at least regarding the FmHA. Plaintiff fails to show current federal law is significantly different than that in effect when *Kimbell Foods* was decided. The Court has no difficulty with inferring congressional acceptance of that decision; as a result, the FmHA contineus to be

bound by state commercial laws. In light of *Kimbell Foods* and its progeny, this Court would be remiss if it failed to apply the Kansas UCC in this case.

The next question is whether Kansas law requires a judgment for defendants on the merits. K.S.A. 84-9-403(2) provides:

> . . . [A] filed financing statement is affective for a period of five (5) years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of sixty (60) days or until expiration of the five-year period, whichever occurs later. Upon lapse the security interests becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

Under this provision, after filing lapses the interest of the secured party is subject to defeat by purchasers and lienors even though before lapse the conflicting interest may have been junior. K.S.A. 84-9-403, Official UCC Comm. 3. Subsection (2) above does not vary from the 1972 Official UCC Text.

Plaintiff does not dispute that the FmHA failed to file a continuation statement covering its May 22, 1978 financing statement. Under K.S.A. 84-9-403(2) that financing statement lapsed five years later, on May 22, 1983. Defendant Central Livestock, which gave value for and received the livestock in 1981, was a buyer in the ordinary

course of business as defined in K.S.A. 84-1-201(9). Plaintiff's status as an unperfected financing statement, relates back in time to 1981 as against Central, a post-perfection, pre-lapse purchaser. K.S.A. 84-9-403(2). The rights of the two parties are governed by K.S.A. 84-9-301(1)(c), which states that an unperfected security interest is subordinate to the rights of a buyer of farm products in the ordinary course of business. Defendant Central is entitled to judgment on the merits.

IT IS ACCORDINGLY ORDERED this 23 day of August, 1985, that summary judgment be entered in favor of defendant Central Livestock Corporation on plaintiff's claim of conversion of certain specified livestock valued at $29,755.81.

/s/ Patrick F. Kelly
Judge

(4)

No. 85-727

In the Supreme Court of the United States

OCTOBER TERM, 1985

MISSOURI FARMERS ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-727

MISSOURI FARMERS ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that Farmers Home Administration (FmHA) regulations, rather than state commercial law applicable to private lenders, govern the validity of a release of FmHA liens.

1. Between February 1978 and April 1979, the FmHA made several loans totalling $70,630.00 to Edward Stoops to assist him in operating his farm in Chariton County, Missouri. As part of the loan agreements, Edward and Barbara Stoops executed financing statements creating a security interest in their crops and farm equipment. In 1979 and 1980, the Stoops' financial position worsened, and they eventually defaulted on their loans, leaving an outstanding balance of $67,926.00 at the time of the trial. During the period from March 1, 1980, through July 1, 1980, Edward Stoops sold crops covered by the financing statements to

petitioner for $32,014.90, but did not pay any of the proceeds to the FmHA. Pet. App. 1-2.

2. The United States then filed this suit against petitioner to recover damages for the conversion of property in which it held a security interest. Petitioner in turn brought a third-party claim for indemnification against Stoops. Pet. App. 1. After a trial, the district court entered judgment in favor of the United States for $32,014.90 and denied petitioner's claim for indemnification (*id.* at 1-5). The court rejected petitioner's contentions that the FmHA had lost any enforceable security interest in the Stoops' crops by authorizing the sales to petitioner (*id.* at 2-3). Petitioner claimed that Missouri law provides that a secured creditor's consent to a sale of collateral terminates the creditor's security interest.[1] The government relied on FmHA regulations that provide that the FmHA retains its security interest in collateral sold with its consent, unless the proceeds are used for certain specified purposes not involved here.[2]

---

[1]Missouri's codification of the Uniform Commercial Code provides that "a security interest continues in collateral notwithstanding sale * * * by the debtor unless his action was authorized by the secured party." Mo. Ann. Stat. § 400.9-306(2) (Vernon 1965).

[2]7 C.F.R. 1962.17(b) provides in part that "[FmHA] County Supervisors may release normal income security when the property has been sold or exchanged for its present market value and the proceeds are used for one or more of the following purposes." These "purposes" include payment of debts owed to the FmHA, payment of debts to creditors whose liens are superior to the FmHA's, and payment of income taxes. It is not disputed that the proceeds here were not used for any of the legitimate purposes specified in the regulation. In addition, 7 C.F.R. 1962.18(b) provides:

> The borrower must account for all security * * *. When borrowers sell security, the sale will be made subject to the FmHA lien. The property and proceeds will remain subject to the lien until the lien is released or the sale is approved by the County Supervisor and the proceeds are used for one or more purposes stated in 1962.17.

The court of appeals initially entered a brief per curiam opinion (Pet. App. 12-14) "affirm[ing] the judgment on the basis of the trial court's memorandum and order" (*id.* at 13). The court subsequently granted rehearing and entered a second opinion reaffirming its earlier decision (*id.* at 17-19). The court concluded that "[a]doption of state law in this case would conflict with the federal interests present in the FmHA loan program" (*id.* at 19). Therefore, it ruled that the federal law governing the case, under *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), was that embodied in the federal regulations.

3. The court of appeals' decision is correct, does not conflict with any decision of another court of appeals, and presents no issue warranting review by this Court.

Petitioner contends (Pet. 6-8) that the court of appeals' decision is inconsistent with *United States* v. *Kimbell Foods, supra.* This contention is incorrect. In *Kimbell Foods,* the Court held that "federal law governs questions involving the rights of the United States arising under nationwide federal programs," including the treatment of liens stemming from federal lending programs. 440 U.S. at 726. The particular question presented there was whether there should be a judicially created rule of federal common law that "contractual liens arising from certain federal loan programs take precedence over private liens, in the absence of a federal statute setting priorities." *Id.* at 718. In that context, the Court concluded that there was no need to create such a rule and that instead the content of the federal common law generally should be determined by reference to state law.

Plainly, the decision below does not conflict with *Kimbell Foods.* The court of appeals recognized that *Kimbell Foods* was controlling; the question was what is the content of the governing federal law with respect to the distinct

question of the effect of the FmHA's authorization of a sale of collateral. In contrast to the situation in *Kimbell Foods,* federal regulations directly address that question.[3] Petitioner's contention here is that the FmHA's authorization to Stoops operated as a *waiver* of FmHA's security interest; it is surely reasonable that federal law would look to an agency's own regulations in assessing whether the agency's actions were intended to operate as a waiver.[4] In short, the decision below simply represents the application of the general principle of *Kimbell Foods* to a particular question of commercial law; there is no reason for this Court to review the decision.[5]

---

[3]The Court in *Kimbell Foods* noted that 7 C.F.R. 1930.17 (1978), the predecessor to 7 C.F.R. 1962.17, required the FmHA to comply with certain state procedural rules in connection with security interests. 440 U.S. at 731. The present regulation does require FmHA to follow state procedures where the proceeds of collateral sales are actually used to acquire new property to be held as collateral. 7 C.F.R. 1962.17(a)(2). Here, however, no new property was ever acquired, and there was no expectation that new property would be acquired. In such circumstances, 7 C.F.R. 1962.18(b) is controlling, and that regulation clearly conditions release of the FmHA's lien on the proper disposition of the proceeds.

[4]Thus, in addition to the presence of federal regulations, this case differs from *Kimbell Foods* in that the question is simply the effect of an action taken by the government itself. State law is not displaced, as it would have been in *Kimbell Foods,* with respect to the setting of lien priority, which would affect private liens as well as government liens. Here, there is no doubt, even under state law, that the government had a valid security interest in the goods; the federal regulations come into play only to assess the import of the government's own conduct in authorizing a sale of collateral, *i.e.,* whether it was intended to operate as a waiver. Looking to federal regulations to determine the significance of a unilateral government action is not a "rejecti[on] [of] well-established commercial rules" (440 U.S. at 740) in the way that creating a special priority rule favoring federal liens would have been.

[5]Petitioner erroneously asserts (Pet. 8-9) that the decision below conflicts with decisions in other circuits. None of the cases cited by petitioner involved a federal regulation. To the contrary, in each of those cases, the government and the other party agreed that the federal rule of decision would be based on state law and the dispute was simply over what the state law provided. Here, by contrast, the question is whether the government waived its security interest by authorizing the sale of collateral, and the court of appeals was quite correct in considering federal regulations that address the sale of collateral and specifically identify the circumstances under which FmHA officials are authorized to waive the agency's security interest.

Petitioner also suggests (Pet. 9-11) that the decision below creates an unfair system that will have deleterious effects on the lending market. There is no basis for such an assertion. First, FmHA did not collect "windfall damages" here (see Pet. 8). It is undisputed that FmHA had a valid security interest in the collateral, and petitioner itself states that the sale in question took place as part of a FmHA liquidation plan (see Pet. 3). It was hardly unjust for FmHA to receive the proceeds of this sale, which amounted to less than half the debt owed.

More generally, it is not apparent why petitioner suggests that the decision below works a fundamental change in commercial practice or portends any future difficulties. Even under state law, it is clear that a security interest continues in collateral after it is sold, unless the sale is authorized by the security holder. Thus, if petitioner does not take steps to determine whether goods it purchases are subject to a security interest, it is at risk even under state law. If it does take such steps and learns that the FmHA holds a security interest, it is on notice that the security interest will continue after sale unless the conditions specified in the regulation are met. In either case, petitioner's ability to protect itself remains the same as under state law.[6]

---

[6]Indeed, even in the precise situation presented here, it is not apparent that the result would be different under state law. It is highly questionable that a sale should be considered "authorized" within the meaning of the Missouri statute if the debtor does not satisfy the conditions specified by the creditor in approving the sale. There is a divergence of opinion on the proper treatment under U.C.C. § 9-306(2) (the state

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986

---

provision involved here) of authorizations to sell collateral that are conditioned on certain dispositions of the proceeds. See generally Meyer, "*Crops*" *as Collateral for an Article 9 Security Interest and Related Problems*, 15 U.C.C. L.J. 3, 34-37 (1982). A Missouri intermediate appellate court has indicated that the Missouri statute may be interpreted to resolve such cases in favor of the purchaser, although that case is distinguishable from this one in that the "condition" was not explicit in the security agreement or in a published regulation but simply arose implicitly from a course of dealing. See *Charterbank Butler* v. *Central Cooperatives, Inc.*, 667 S.W. 2d 463 (Mo. Ct. App. 1984). Moreover, the *Charterbank* case did not consider the relevance of Mo. Ann. Stat. § 400.9-307(1) (Vernon 1965), which excepts "a person buying farm products from a person engaged in farming operations" from certain protections against security interests accorded to a "buyer in [the] ordinary course of business." At any rate, this uncertainty about the meaning of the U.C.C. underscores the appropriateness of having a uniform federal rule on this point derived from applicable federal regulations.

No. 85-727

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ERNEST H. VAN HOOSER
Counsel of Record
GERARD D. EFTINK
BRIAN D. KEEDY
On the Brief
VAN HOOSER & OLSEN, P.C.
9200 Ward Pkwy. Suite 636
Kansas City, Missouri 64114
(816) 523-6161
Counsel for Amicus Curiae

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

No. 85-727

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Livestock Marketing Association (hereinafter LMA) respectfully moves this Court, pursuant to Rule 36, for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari.

The *amicus* is a national trade association of businesses involved in the sale and marketing of livestock. The members of LMA have a vital interest in the issue raised in this case because its resolution will have a great impact in their everyday business decisions.

It is a well-established proposition that federal law governs questions involving the rights of the federal government arising under nationwide federal programs such as the Farmers Home Administration's farm loan programs. When there is no federal statute to determine issues aris-

ing under these federal programs, however, the courts must determine what the federal law is. Is it a judicially constructed uniform rule of law or is state law incorporated as the applicable federal law?

Prior to this court's decision in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), seven circuits had ruled on this question. Five of the seven circuits favored a judicially constructed uniform rule of law and two (including the Eighth Circuit) incorporated state law as the applicable federal law. Relying on this court's guidance in *Kimbell*, a majority of the circuits now use incorporated state law as the applicable federal law to resolve issues arising under the federal loan programs. In the instant case, however, the Eighth Circuit - apparently relying on *Kimbell* - has seen fit to depart from its former position of using incorporated state law and has departed from the decisions of a majority of the other circuits.

Because of the apparent confusion regarding this Court's test for determining the source of federal law when there is no federal statute, *amicus* supports the petition for a writ of certiorari and seeks permission to submit its brief to assist the Court in considering the issues raised by this litigation.

Respectfully submitted,

VAN HOOSER & OLSEN, P.C.

By ERNEST H. VAN HOOSER
9200 Ward Parkway, Suite 636
Kansas City, Missouri 64114
(816) 523-6161
Counsel for Amicus

November, 1985

QUESTION PRESENTED

Whether the Eighth Circuit's refusal to incorporate state law as the applicable federal law governing Farmers Home Administration security interests conflicts with this Court's unanimous decision in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and resurrects and perpetuates the conflict among the circuits which *Kimbell* sought to resolve.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Regulations

State Statutes

Texts

No. 85-727

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

BRIEF OF THE LIVESTOCK MARKETING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS

The interest of the *amicus* is detailed in the motion accompanying this brief.

STATEMENT OF THE CASE

The facts involved in this case were undisputed at the district court level and the court of appeals level.

In 1984 Edward and Barbara Stoops (the "Stoops") began borrowing money from the Farmers Home Administration (FmHA) and executed security agreements granting the FmHA an interest in farm equipment and crops. In 1979 and 1980 the Stoops defaulted on the notes to the FmHA. In 1980 as part of a liquidation plan the FmHA, in the person of both its State Director and its County Supervisor, expressly instructed the Stoops in writing to sell remaining crops and livestock, allowing the Stoops the discretion to decide when the market prices were best. Following the FmHA's directions, the Stoops sold crops to the Missouri Farmers Association, Inc. (MFA), and MFA promptly paid the Stoops for the crops.

In 1983 the FmHA brought this conversion action against MFA seeking to recover the value of the crops purchased by MFA, in effect asking that MFA pay a second time for the full value of the crops. The FmHA pled the case under the common law theory of conversion. Under the common law, conversion occurs if a person exercises dominion or control over property of another against the other person's wishes. MFA answered by arguing that FmHA did not have a security interest in the crops but that, even if it did have a security interest, the FmHA had authorized the sales of the crops under R.S.Mo. §400.9-306.

The district court in its initial decision applied Missouri law to decide the issue of whether the FmHA had a security interest in the crops purchased by MFA. *United States v. MFA, Inc.*, 580 F.Supp. 35, 36 (E.D. Mo. 1984). On the authorization issue, the district court also appeared to apply Missouri law in deciding that the FmHA had not "released" its lien. On rehearing the district court reconsidered its ruling on the authorization issue in light of

a March 1984 Missouri Court of Appeal decision on the authorization argument, but declined to follow that case.[1]

On appeal the Eighth Circuit Court of Appeals held initially, in a brief *per curiam* decision, that the record on appeal revealed no mistake of law or fact. 753 F.2d 714 (8th Cir. 1985). On rehearing the Eighth Circuit ruled that Missouri law would not be applied in this case because it would conflict with the federal interests present in the FmHA program. Rather than apply the Missouri law as set out in *Charterbank Butler* the court chose to apply internal FmHA administrative regulations which address the circumstances under which FmHA officials have the authority to release security interests.

SUMMARY OF THE ARGUMENT

The decision of the Eighth Circuit fails to apply correctly the test established by this Court in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) for determining the source of federal law when there is no governing federal statute. The Eighth Circuit completely ignored the first step of the *Kimbell* test, miscomprehended the essence of the second step, and summarily disposed of the third step without adequate justification or support for its stated position.

The decision of the Eighth Circuit is in direct conflict with the decisions of a majority of the circuits on the same issue, thereby evidencing confusion among the circuits

---

1. *Charterbank Butler v. Central Cooperatives, Inc.*, 667 S.W.2d 463 (Mo. App. 1984). This Missouri case joined numerous cases from other states in holding that under §9-306(2) of the U.C.C. a secured party cannot prevail in a conversion action against a third party purchaser if the secured party authorized the sale of the collateral.

with respect to this Court's test for determining the proper source of federal law. Since *Kimbell* five circuits have decided cases in which the courts had to determine the source of federal law applicable to FmHA claims against commission merchants that have sold mortgaged farm products or buyers that have purchased farm products. Three circuits have incorporated state law as the applicable federal law and two circuits have declined to incorporate state law.

The decision of the Eighth Circuit would permit a federal agency to change established federal and state law by promulgating self-serving regulations. Under both common law and state statutory law[2] a secured party who authorizes sales of collateral cannot hold a purchaser of collateral liable for conversion, for the simple reason that there can be no conversion if the secured party consents to (authorizes) sale of the collateral.[3] There is no evidence that Congress intended for the FmHA to have the authority to write such "heads we win, tails you lose" regulations so as to defeat hundreds of years of common law as codified by the states in section 9-306(2) of the U.C.C. This Court in *Kimbell* found, to the contrary, that Congress did not intend for the FmHA to have special privileges in its loan programs.

---

2. Section 9-306(2) of the Uniform Commercial Code, as adopted by 49 states, provides: Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof *unless the disposition was authorized* by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor. (Emphasis added.)

3. Conversion occurs if a person exercises dominion and control over property of another against the other person's wishes. Clearly, if the person has consented to a sale of the property such sale is not against his wishes and there can be no conversion.

ARGUMENT

A.

The Decision By The Eighth Circuit Fails To Apply Correctly The Test Established By This Court In United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) For Determining The Source Of Federal Law When There Is No Governing Federal Statute.

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), this Court was asked to determine whether liens arising under federal loan programs take precedence over liens arising under state law absent a federal statute setting priorities. In resolving the question this Court concluded first, that federal law applied and second, that the source of that federal law (whether a judicially devised federal rule or incorporated state law) was to be found by weighing three factors: 1) the need for nationally uniform body of law; 2) whether application of state law would frustrate specific objectives of the federal program; and 3) the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. After applying these factors to the facts in *Kimbell*, this Court incorporated state law as the appropriate federal rule of decision.

The Eighth Circuit, recognizing the absence of an applicable federal statute, apparently relied on *Kimbell* to formulate a federal rule of decision to resolve issues related to the release of an FmHA lien. In applying *Kimbell*, however, the Eighth Circuit failed to address the first step of the *Kimbell* test: it failed to determine whether there was a need for a nationally uniform body of law. If the Eighth Circuit had addressed this step of

the test it would have found adequate guidance in *Kimbell* itself, where this Court determined there is little need for a nationally uniform body of law in the FmHA lending programs. 440 U.S. at 719.

In its analysis, the Eighth Circuit vaulted to the second step in the test: whether application of state law would frustrate specific objectives of the federal program. Offering scant explanation, the Eighth Circuit merely stated that "adoption of state law in this case would conflict with the interests present in the FmHA loan program." 764 F.2d at 489.

The specific test announced in *Kimbell* was "whether application of state law would frustrate specific *objectives* of the federal program." 440 U.S. at 729 (emphasis added). The Supreme Court defined the FmHA's objectives as "assisting farmers . . . that cannot obtain funds from private lenders on reasonable terms." *Id.* at 736. The Eighth Circuit's decision contains no language to show that it considered the objective of the FmHA's loan program as defined by this Court. The court simply used the wrong measuring device to find that a conflict existed.

The federal interest with which the Eighth Circuit found a conflict (though unarticulated) is actually the FmHA's interest in recovering funds disbursed to farmers through loan programs. This issue has been faced by this Court before. In *Kimbell* the FmHA argued that "applying state law to these lending programs would undermine its ability to recover funds disbursed and therefore would conflict with program objectives." *Id.*, p. 733. However, this Court refused to grant the FmHA special protection when it stated:

> . . . had Congress intended the private commercial sector, rather than taxpayers in general, to bear the risks of default entailed by these public welfare programs, it would have established a priority scheme displacing state law." (*Id.*, p. 734.)

The Eighth Circuit's decision flies in the face of this Court's decision not to grant the FmHA special protections in recovering disbursed funds. In effect the Eighth Circuit has given the FmHA special protections not available to private lenders in the same circumstances. The FmHA is permitted to recover from third parties regardless of whether they consented to sales of collateral whereas private lenders would be foreclosed from pursuing the same parties under identical circumstances.

In disposing of the third step of the *Kimbell* test, the Eighth Circuit summarily decided that failure to incorporate state law would not disrupt commercial transactions in Missouri because a purchaser of farm products "can easily determine whether or not the goods are covered by an FmHA security interest and take appropriate steps to protect itself from liability." 764 F.2d at 490. This simply is not true. If, for example, a buyer is purchasing farm products from sellers who reside in several counties in Missouri the buyer would have to check in each county each time a seller sells merely to determine who has filed financing statements. Then, because financing statements do not necessarily contain the same description of the collateral as the security agreement itself, nor do they indicate whether a secured party has consented to sales of some of the collateral covered by the security agreement, the buyer would have to contact each secured party to determine whether the specific product being sold was covered and whether the secured party had consented to the sale or not. When a buyer such as MFA is buying from hundreds of sellers on any given day it becomes an impossible task to make all necessary inquiries.

The second problem with the Eighth Circuit's statement is that buyers simply may not be able to determine whether the farm products are mortgaged or not. If, for example, an elevator is purchasing grain from a person who has purchased the grain from someone else, the elevator would not know the identity of the original seller. And, even though the person selling the grain directly to the elevator had granted no security interest to anyone, the elevator would still be subject to the security interest created by the original seller.[4]

Even without the difficulties encountered as a subsequent purchaser, buyers and commission merchants are often simply not able, because of time constraints, to check for liens on all the farm products they buy or sell. This is especially true for livestock markets, livestock dealers and packers. Under the Packers and Stockyards Act, livestock markets, dealers and packers are required to pay for livestock by the close of the next business day following the date of the transaction. 7 U.S.C. §228(b). This makes it virtually impossible to make all of the inquiries necessary to determine the interest or non-interest of any third parties and still abide by federal statutory law.

Thus determining whether or not the goods are covered by a security interest is a difficult, time consuming process at best, without decisions such as the Eighth Circuit's which would allow a secured party to authorize the sale and then unilaterally rescind the authorization.

---

4. *See* Coates, *Financing the Farmer*, 20 Prac. Law 45, Nov. 1974 at 49; Dugan, *Buyer - Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code*, 46 U. Colo. L. Rev. 333, 334 (1975); Dolan, *Section 9-307(2): The U.C.C.'s Obstacle to Agricultural Commerce in the Open Market*, 72 Nw. U. L. Rev. 706, 713 (1977).

B.

The Decision Of The Eighth Circuit Is In Direct Conflict With The Decisions Of Other Federal Courts On The Same Issue Thus Indicating An Inability Of The Circuits To Apply This Court's Test For Determining The Proper Source Of Federal Law.

This Court's decision in *Kimbell,* narrowly construed, established that state law should be adopted as the federal rule of decision in cases involving disputes as to the priority of consensual liens. However, the *Kimbell* test for determining the content of a federal rule of decision is applicable to a wide variety of cases where federal courts are faced with the task of formulating the federal law. The question of what law should be applied as the federal rule in such cases "depend[s] upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." 440 U.S. at 728. This choice of law procedure was designed to guide federal courts through the steps necessary to make a proper determination of the applicable federal rule. Regrettably, the courts have demonstrated an inability to apply the *Kimbell* choice of law test to the specific facts and issues unique to farm products conversion cases. Consequently, different federal courts facing the same issue have reached a variety of conclusions.

A majority of the federal courts that have decided the source of federal law in FmHA mortgaged farm products conversion cases have adopted state law. *United States v. Friend's Stockyard, Inc.*, 600 F.2d 9 (4th Cir. 1979) (FmHA sued two livestock auctioneers who sold cattle for a farmer who had previously given the FmHA a security interest in those cattle. The Fourth Circuit

held that the law of the state in which the transaction occurred should be incorporated as the federal law.); *United States v. Public Auction Yard,* 637 F.2d 613 (9th Cir. 1980) (A Montana statute limiting the liability of livestock auction markets selling mortgaged livestock was adopted as the federal rule of decision.); *United States v. Southeast Mississippi Livestock Farmers Association,* 619 F.2d 435 (5th Cir. 1980) (Mississippi U.C.C. law was applied as the federal rule of decision to determine whether a description of collateral was sufficient to give notice of the FmHA's security interest.); (*See also United States v. Bailey Feed Mill, Inc.,* 592 F.Supp. 844 (E.D. N.C. 1984), where the district court incorporated a North Carolina statute limiting the duration of a security interest in crops to 18 months as the federal rule to determine the effectiveness of an FmHA claim against a feed mill which purchased soybeans from a farmer.) Thus the Eighth Circuit has placed itself in direct conflict with the decisions of these other circuits.

The Eighth Circuit is also in conflict with circuits having routinely adopted state law as the federal rule of decision to resolve legal issues typically settled by application of the U.C.C. *United States v. Meadors,* 753 F.2d 590 (7th Cir. 1985); *United States v. Rhine Main Associates,* No. 82-3136 slip op. (6th Cir. April 15, 1985); *United States v. Lattauzio,* 748 F.2d 559 (10th Cir. 1984). *See also, Johnson v. United States Department of Agriculture,* 734 F.2d 774 (11th Cir. 1984) (State law governing methods of foreclosure was adopted as the federal rule applicable to the FmHA).

In *United States v. Kennedy,* 738 F.2d 586 (3rd Cir. 1984), the Third Circuit flatly stated *Kimbell* is not controlling in farm products conversion cases, finding that it

applies only when there is no existing federal law. In this case the Third Circuit held that there was an existing common law rule of conversion as developed in the 1963 Third Circuit decision of *United States v. Sommerville,* 324 F.2d 712 (3rd Cir. 1963). In *Kennedy,* the pre-*Kimbell* common law rule was applied as the federal rule of decision. A district court judge in the Eastern District of Pennsylvania has taken the *Kennedy* decision one step further, holding that federal regulations control over state law. *United States v. New Holland Sales Stable, Inc.,* 603 F. Supp. 1379, 1383 (E.D. Pa. 1985). Citing *Kennedy,* the district judge rejected *Kimbell* as being inapplicable because of the existence of a federal regulation governing the release of FmHA liens. This judge ruled that the existence of a federal regulation (albeit a procedural regulation designed to guide FmHA officials) preempted any analysis of whether substantive state law should be incorporated as the federal rule of decision.

In direct conflict with the *New Holland* decision, a recent decision by a federal judge from the District of Kansas held that FmHA administrative regulations do not equate with a Congressional proclamation which, under *Kimbell,* would preclude adoption of state law. *United States v. Central Livestock Corporation,* No. 85-1065K slip op. (D. Kan. August 25, 1985). This decision relied on *Kimbell* to hold that state law would be applied as the federal rule of decision while rejecting the FmHA's argument that their internal regulations were "federal law" that could supersede state commercial law. The very argument adopted by the Missouri U.S. District Court and the Eighth Circuit was soundly rejected by the District Court in Kansas.

The agricultural marketing industry currently operates amidst confusion about what law to rely on to de-

termine exposure or potential liability for the purchase or sale of mortgaged farm products. Various federal courts have at different times applied as the federal rule of decision in mortgaged farm products conversion cases: 1) state law, 2) a pre-*Kimbell* common law rule of conversion liability, and 3) federal agency regulations. The inability of federal courts to apply this Court's *Kimbell* decision consistently has served to aggravate business tensions in the industry, especially in interstate commercial transactions. *Amicus* urges this Court to grant certiorari in this case and instruct federal courts how the *Kimbell* decision applies to farm products conversion cases.

C.

The Decision Of The Eighth Circuit Permits A Federal Agency To Nullify Established Common Law And State Statutory Codification Of The Common Law By Issuing Self-Serving Regulations.

Historically, the common law has recognized that there can be no tort of conversion if the injured party consented to the alleged conversion. This common law rule has been codified in the Uniform Commercial Code in §9-306 (2), which provides that there is no liability to a secured party if the secured party consented to (or "authorized") the sale of its collateral. A plaintiff cannot complain that he has been injured if he consented to the action that caused his injury.

This rule has uniformly been recognized by state courts and by many federal courts. See, *United States v. Lindsey*, 455 F.Supp. 449 (N.D. Tex. 1978), *United States v. Central Livestock Assn.*, 349 F.Supp. 1033 (D. N.D. 1972).

The FmHA has sought to nullify the consent (or "authorization") defense by promulgating regulations which would literally provide that authorization given by the FmHA is not available as a defense to the unfortunate businessperson who purchases farm products. 7 C.F.R. §§1962.17 and 1962.18. These regulations would provide first, that despite authorization, the lien of the FmHA continues in both the farm products and the proceeds after the sale, and second, that in any event authorization given by the FmHA is not binding on the government if it later turns out that the action in authorizing the sale of collateral was to the "detriment" of the government.

There is no evidence that Congress intended for the FmHA to have the authority to write such regulations. This Court in *Kimbell* found, to the contrary, that Congress did not intend for the FmHA to have special privileges. The regulations on this point written by the FmHA are beyond the scope of their authority, contrary to the *Kimbell* decision, and, in any event, unconscionable.

The problem caused by the Eighth Circuit decision in adopting these regulations as law can be best shown by describing a typical transaction. Farmer borrows money from the FmHA and gives the FmHA a security interest in all his livestock. The FmHA authorizes Farmer to sell 50% of his calves every year and to use the proceeds to pay certain expenses. Over a period of years Farmer does exactly what the FmHA told him to do. He sells calves every year to a local livestock market. Later Farmer defaults on his FmHA loan. The FmHA then sues the local livestock market for the value of all calves sold by Farmer to the market, even though the FmHA *had consented* to all the sales. Under the decision of the Eighth Circuit the fact that the FmHA authorized the sales would

be no defense; the livestock market would have to pay a second time for all the cattle sold.

In effect the Eighth Circuit decision creates new law. It allows the FmHA to avoid the universally recognized defense of consent. Presumably, under the Eighth Circuit's ruling, other federal agency lenders could also avoid the defense of consent in the Eighth Circuit by merely writing administrative regulations similar to those of the FmHA. This result clearly is contrary to the intent of this Court's decision in *Kimbell Foods,* as articulated in *United States v. S.K.A. Associates,* 600 F.2d 513, 516 (5th Cir. 1979):

> Yet it seems to us that Justice Marshall in his very detailed opinion for a unanimous Court in *Kimbell Foods* sought to carefully instruct Government agencies that in their commercial lending activities they are subject to "customary commercial practices" [citing *Kimbell* 440 U.S. at 735] and should fare no better, and no worse, than a private lender.

CONCLUSION

The Eighth Circuit's decision in the instant case conflicts with the holding of this court in *Kimbell* and is an example of the difficulties being experienced by the federal courts in applying *Kimbell* to farm products "conversion" cases.

With the continuing farm crisis - especially among FmHA farmer-borrowers - *amicus* believes the federal courts will experience ever growing numbers of farm products "conversion" cases where they are called upon to

determine the source of federal law.[5] Absent additional direction from this Court the agricultural marketing industry will continue to labor under the confusion and tension created by the inconsistent application of a variety of laws. *Amicus,* therefore, respectfully requests that the Court grant the petition for a writ of certiorari.

ERNEST H. VAN HOOSER
Counsel of Record
GERARD D. EFTINK
BRIAN D. KEEDY
On the Brief
VAN HOOSER & OLSEN, P.C.
9200 Ward Pkwy. Suite 636
Kansas City, Missouri 64114
(816) 523-6161
Attorneys for Amicus Curiae

---

5. According to statistics released by the Farmers Home Administration in 1983, the FmHA, at the end of fiscal year 1978, had claims valued at $766,663 pending in the U.S.D.A.'s office of General Counsel against buyers and commission merchants for converting the FmHA's interest in secured livestock. At the end of fiscal year 1982, there were claims valued at $6,581,968 pending. At the end of fiscal year 1978, the FmHA had no claims pending against buyers and commission merchants for converting the FmHA's interest in secured grain. At the end of fiscal year 1982, there were claims valued at $7,194,321 pending.

NO. 85-727

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,
Petitioner

v.

THE UNITED STATES OF AMERICA

BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

James S. Krzyminski
Counsel Of Record
Leslie S. Mead
National Council of Farmer Cooperatives
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 659-1525

January 2, 1986

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REGULATIONS

OTHER AUTHORITIES

NO. 85-727

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,
Petitioner

v.

THE UNITED STATES OF AMERICA

AMICUS CURIAE BRIEF OF NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF THE NATIONAL COUNCIL OF FARMER COOPERATIVES

The National Council of Farmer Cooperatives, hereinafter referred to as the National Council, is a nationwide association of cooperative businesses which are owned and controlled by farmers. Its membership includes 101 major marketing and farm supply cooperatives, the 37 banks of

the Farm Credit System, and 33 state councils of farmer cooperatives. National Council members handle practically every type of agricultural commodity produced in the United States, market these commodities domestically and around the world, and furnish production supplies and credit to their farmer members and patrons.

Five out of six United States farmers are affiliated with one or more cooperatives. The National Council represents about ninety percent of the nearly 5,800 local farmer cooperatives in the nation, with a combined membership of nearly two million farmers.

The interest of the National Council in this matter is confined and limited essentially to those portions of the Eighth Circuit's opinion which appear to call into question the decision of this Court in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) which holds that

nondiscriminatory state law would be adopted as federal law governing commercial transactions of federal lending agencies in the absence of a congressional directive to the contrary. Any deviation from this Court's holding in Kimbell Foods will disrupt the predictability of daily commercial transactions involving farm commerce and credit throughout the nation.

SUMMARY OF ARGUMENT

The Eighth Circuit's refusal to apply the Uniform Commercial Code as incorporated federal law governing Farmers Home Administration security interests conflicts with this Court's unanimous decision in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), and resurrects and perpetuates the conflict among the circuits which Kimbell Foods sought to resolve.

ARGUMENT

I. Circuit Court Order Disrupting Credit Markets.

This Court, in its unanimous decision in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), resolved conflicts among the circuits by holding that nondiscriminatory state law would be adopted as federal law governing commercial transactions of the FmHA and other federal lending agencies in the absence of a congressional directive to the contrary. The Kimbell Foods decision brought a much needed measure of uniformity to commercial transactions involving the commerce of farm products and the issuance of farm credit. The decision subjected the FmHA to the same market forces and commercial laws governing private lenders.

As a result of the Kimbell Foods decision, farmer cooperatives and private farm lending institutions could plan daily commercial transactions on the basis of Uniform Commercial Code principles without fear that the uniform standards would be inoperative every time a federal lending agency became a part of a commercial transaction. As a result, money could be loaned to farmers with the knowledge that priority disputes regarding collateral would be resolved by Uniform Commercial Code principals. Moreover, farm products could be purchased by cooperatives from farmers with the knowledge that authorized sales would also be governed by the principles of the Uniform Commercial Code.

As a nationally recognized commentator on this subject observed:

> [As a result of the unanimous Kimbell Foods decision] the FmHA and other federal lending agencies are clearly governed by the same rules which control the rights and duties of private secured parties.... [F]ederal agencies will be measured by the same standards as commercial banks, credit unions, finance companies and credit sellers. This means uniformity, which is the hallmark of the UCC.

Clark, The Law of Secured Transactions Under The Uniform Commercial Code, Section 1.8[1][g] (1980).

The predictability and uniformity created by the Kimbell Foods decision has been destroyed by the recent per curiam decisions of the Eighth Circuit which applied the self-serving FmHA administrative regulations as the commercial law governing commercial transactions of the FmHA. The Eighth Circuit's decision has completely disrupted the predictability of daily commercial

transactions involving farm commerce and credit throughout the midwest and nationwide. No longer can private farm lending institutions or farm product purchasers plan their commercial transactions on the basis of Uniform Commercial Code principles.

The Eighth Circuit's application of a regulation which states that the FmHA can take no action "to its financial detriment", see, 7 C.F.R. Section 1962.17 (1985), grants the FmHA a "special status" it was denied by this Court in the Kimbell Foods decision. 440 U.S. at 737. As a result, lending priorities which private farm lending agencies expected when making loans to farmers are rendered meaningless if the FmHA is given priority regardless of its commercial conduct.

Similarly, millions of dollars of farm product purchases are clearly in jeopardy in light of the Eighth Circuit's decision. Grain purchased from FmHA debtors by farmer cooperatives throughout the nation may now be subject to FmHA liens. Prior to the per curiam decision of the Eighth Circuit, farmer cooperatives, in purchasing farm products FmHA debtors were permitted to sell, could expect that the farm products were free and clear of FmHA liens as provided by Uniform Commercial Code Section 9-306(3). Now, however, in light of the per curiam order, the FmHA can ex post facto deny "release" of liens on farm products, make a claim for those products, and place in dispute the right to many millions of dollars of grain. In fact, the FmHA is using the recent decision of the Eighth Circuit to claim a security interest in grain in which, prior to that decision,

it knew it had no legal interest.

The FmHA should not be permitted to simply promulgate a self-serving regulation to overcome commercial code principles it dislikes. Because the Eighth Circuit has ignored this Court's ruling in Kimbell Foods, the FmHA is now permitted to conduct business under different commercial standards. Farmer cooperatives, consequently, are forced to conduct business under two sets of commercial rules, one for private parties and another for federal agencies. The farm community is without guidance in its daily commercial transactions because the uniformity, equality and predictability of commercial law created by the Kimbell Foods decision has been destroyed.

As Congress and this Court have observed, the Uniform Commercial Code is, in essence, "neutral" because it was not

drafted, unlike the FmHA regulations, by a party to the commercial transaction. To allow the Circuit Court's per curiam decision to be left intact will not only be unprecedented and contrary to the decision of this Court but will result in a distinct disservice to states which have gone so far in achieving the desirable goal of uniform laws governing commercial transactions. Kimbell Foods, 440 U.S. at 732, n. 28. MFA's petition for a writ of certiorari should be granted and this Court should reaffirm its prior holding in Kimbell Foods which refused to grant a special status to federal lending programs.

CONCLUSION

The Kimbell Foods decision requires the application of the Uniform Commercial Code to the commercial transactions of the FmHA unless Congress directs otherwise. Congress has not acted to change the

Kimbell Foods holding. In fact, Congress intended the FmHA to be subject to the same market forces as private parties. The Eighth Circuit's decision has created chaos in farm commerce and credit. Thus, the National Council respectfully asks this Court to grant MFA's petition and to reverse the Eighth Circuit's misdirected decision.

Respectfully submitted,

James S. Krzyminski
Counsel Of Record
Leslie S. Mead
National Council of Farmer Cooperatives
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

(5)

No. 85-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY

WAYNE H. HOECKER
JOSEPH A. COLUSSI
(Counsel of Record)
GAGE & TUCKER
2345 Grand Avenue
Post Office Box 23428
Kansas City, Missouri 64141
(816) 474-6460
Counsel for Petitioner

Of Counsel for Petitioner:
JAMES T. MALYSIAK
FREEMAN, FREEMAN & SALZMAN, P.C.
Suite 2700
401 North Michigan Avenue
Chicago, Illinois 60611
(312) 222-5100

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

19pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE MISSOURI FARMERS ASSOCIATION, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

PETITIONER'S REPLY

In its brief opposing certiorari, the Government avoids grappling with the real and important issues presented by the Eighth Circuit decision and instead attempts to distract the Court from full consideration of this case by stringing together a series of erroneous, misleading, and sometimes wholly irrelevant arguments. In the end, it is what the Government fails to say which is most significant.

1. The Conflict with *Kimbell Foods*

The Government attempts to paper over the conflict with *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), by contending that the specific issue in *Kimbell Foods* (FmHA's priority in relation to other creditors) is distinct from the specific legal issue here (FmHA right to enforce its security interest against non-creditors). But

the Government fails to offer any valid or persuasive reasons for concluding that a different choice of law should be made here, and there is none.[1]

The Government erroneously suggests, first, that unlike *Kimbell*, the FmHA regulations here directly address the question presented. But the FmHA regulations here address only the circumstances under which FmHA will affirmatively *release* its lien; they do not deal with the question of what authorization of sale by FmHA will result in a loss of its security interest in the collateral. *See United States v. Central Livestock Corp.*, 616 F.Supp. 629, 633 (D.Kan. 1985). Surely FmHA cannot "reverse" *Kimbell* by placing its losing argument there into one of its own regulations; but that appears to be the Government's argument here. While this Court in *Kimbell* stated that congressional statutes could supercede the choice of state law for FmHA security interests, nothing in the opinion suggests that the agency could write its own law to govern its own security interests, and such an outcome would violate the congressional policy on which *Kimbell* was based that FmHA *not* be granted special commercial status.

The Government suggests, second, that this case differs from *Kimbell* in that here the issue is one of "waiver" of FmHA security interests, and that it is reasonable to look to the agency's own regulations to determine whether there was a waiver. This, according to the Government,

[1] The leading commentator in this area finds no basis for limiting *Kimbell* to the specific issue addressed:

> Although *Kimbell Foods* involved the first-to-file rule of §9-312 and the statutory lien priority of §9-310, the rationale extends to other priority rules such as exposure for the farm products purchaser under §9-307. [B. Clark, The Law of Secured Transactions §8.4[3][d] (1980), at 8-34.]

would not supplant any state commercial law. But the issue is not one of "waiver", but rather one of authorization of sale. State law specifically recognizes that authorization of the collateral sales by the secured party cuts off its interest in the sold collateral and prevents the purchaser from being held liable for conversion. Mo.Rev.Stat. §400.9-306(2) (1978). Application of FmHA's regulations, however, completely eliminates the long-standing consent defense. Indeed, the Eighth Circuit recognized this conflict between state law and FmHA's regulations and made the conflict the focus of its decision. *United States v. Missouri Farmers Ass'n, Inc.*, 764 F.2d 488, 489 (8th Cir. 1985).

Third, the Government attempts to distinguish *Kimbell* by contending that there FmHA's regulations required substantial agency compliance with UCC procedural rules, whereas here the regulation requires only UCC perfection of the agency's security interest in any new property bought with collateral proceeds. But the Government has plainly failed to read all of its own regulations. FmHA, in fact, is required by its own regulations to comply with the UCC rules governing perfection of its security interest in farm commodities, continuation of perfection, and termination of the security interest. 9 C.F.R. §§1962.5(a),(b),(d); 1962.24. FmHA must also specifically comply with the UCC rules governing a debtor's requests for information concerning the security and unpaid balance of FmHA indebtedness covered by the UCC financing statement. 9 C.F.R. §1962.14. Clearly, *Kimbell* cannot be distinguished on this ground.

Significantly, the Government says nothing about the congressional policy which this Court explained in *Kimbell Foods* as the basis for its decision that state commercial law should govern FmHA security interests. Nowhere in its opposing brief does the Government explain how the

Eighth Circuit result can square with the congressional desire to subject FmHA to the rigors and incentives of the marketplace so that it efficiently manages its loans.

2. The Conflict Among the Circuits

The Government tries to paper over the inter-circuit conflict by contending that none of the cases cited in the Petition from other circuits involved the application of a federal regulation. The reason for that, of course, is that those circuit courts understood *Kimbell* to require the application of state law, which they then applied. *See also* the recent decision by the Fourth Circuit in *United States v. Tugwell*, ____ F.2d ____ (4th Cir. 1985) (slip op. attached hereto as Appendix G), in which *Kimbell Foods* was specifically followed in applying the North Carolina UCC to the sale of FmHA collateral.[2]

3. The Different Result Under Incorporated State Law

The Government's contention that the decision below might not change if state law were applied must be rejected out of hand. The governing state law decision, *CharterBank Butler v. Central Cooperatives, Inc.*, 667 S.W.2d 463, 466 (Mo.App. 1984), specifically held that a secured party's consent to collateral sales, provided that the sales proceeds are then paid to the secured party, operates as consent under the UCC and absolves the purchaser of any liability even if the proceeds are not remitted to the lender. *CharterBank* is but one in a series of UCC decisions in recent years in various states that consent to sales conditioned on the debtor's specified use of the proceeds after the sales, frees the collateral of the security interest even if the debtor fails to make the specified use of the proceeds. *See Peoples National Bank v. Excel Corp.*, 695 P.2d 444, 448-450 (Kan. 1985); *Colorado State Bank of Walsh v. Hoffner*, 701 P.2d 151, 153 (Colo. App. 1985); *Anon, Inc. v. Farmers Production Credit Ass'n*, 446 N.E.2d 656, 662 (Ind.App. 1983); *National Livestock Credit Corp. v. Schultz*, 653 P.2d 1243, 1244-1247 (Okl.App. 1982); *Western Idaho Production Credit Ass'n v. Simplot Feed Lots, Inc.*, 678 P.2d 52, 55-56 (Idaho 1984); *Ottumwa Production Credit Ass'n v. Heinhold Hog Market, Inc.*, 340 N.W.2d 801, 802-803 (Iowa App. 1983). As a leading commentator has concluded:

> [T]hese decisions make good sense because they allow Article 9 to dovetail with the standard practice of consenting to the sale of the farm products on the condition that the proceeds be remitted for payment of the loan. The secured creditor should not have the best of both worlds: an anti-sale provision in the security agreement which is ignored so long as the loan is being paid but is suddenly relied upon when the debtor falls into default. Under these circumstances, the courts should bend over to protect the ordinary course buyer and to promote ready exchange in the agribusiness marketplace. [B. Clark, Law of Secured Transactions, 1983 Cum.Supp. No. 2, ¶8.4[3][b], at S.8-7.][3]

---

[2] "The relevant federal law is, by adoption, local state law, here the law of North Carolina, because the need for national uniformity is not great, adoption of North Carolina law will not frustrate the FmHA program, and adoption of a rule different from local law could disrupt local practice." (App. G at G-3.)

[3] The Government's specious argument that UCC §9-307(1), Mo. Rev.Stat. §400.9-307(1), may somehow result in a FmHA recovery under state law must be rejected out of hand. Section 9-307 applies "only to unauthorized sale by the debtor." Official UCC Comment to §9-307, §2.

4. The Unfairness of the Result

The Government also argues that the decision below is not unfair and does not result in windfall damages for FmHA because FmHA was simply recovering the sale proceeds of its collateral. But the unfairness is palpable once it is understood that petitioner would not be liable under state law, acted innocently and in good faith, which is not denied, and is not being forced to pay the actual sales proceeds to the Government, but rather to indemnify FmHA for its debtor's default by paying *twice*, once to the debtor-seller and now again to the Government.

5. The FmHA Regulations Eliminate the Consent Defense and Guarantee FmHA Recovery

The Government, finally, suggests that the decision below does not result in a fundamental change in commercial practice because even under state law the security interest would continue in collateral that is sold unless the sale is authorized by the secured party. Thus, according to the Government, petitioner would still have to take steps to determine whether the commodities it buys are subject to a security interest. This ignores the critical fact that the decision below *eliminates* the consent defense available under state law and that in virtually all instances, as here, it is standard practice for the secured party to consent to the sales of the farm product collateral. *See* Clark, *supra*, 1983 Cum.Supp. No. 2; *see also First National Bank and Trust Co. of Oklahoma City v. Iowa Beef Processors, Inc.*, 626 F.2d 764, 767 (10th Cir. 1980): "The reality of cattle financing arrangements is that the secured party expects and wants the collateral to be sold continually in order for it to receive payment on the line of credit it has extended." Thus if state law applied, petitioner would have to worry only about those rare instances in which the farm products are sold without the consent of the secured party, whereas under the Eighth Circuit decision petitioner is potentially liable for every purchase of FmHA collateral regardless of FmHA's consent.

Moreover, the decision below insures that the Government will "always prevail, without regard for the status or rights of the competing party under state law. Clearly, the Department of Agriculture could not have dictated that result, nor did it intend to in the regulation on which [FmHA] relies." *Central Livestock*, 616 F.Supp. at 633.

CONCLUSION

This Court's *Kimbell Foods* decision provides that state law governs FmHA security interests as incorporated federal law unless Congress directs otherwise, which it has not, or there is "concrete evidence that adopting state law would adversely affect administration of the federal programs." 440 U.S. at 730. The Eighth Circuit refused to follow *Kimbell* despite the absence of any such "concrete evidence," and the Government in this Court makes no claim that there is such evidence.

This Court should, therefore, grant plenary review in this case to put an end to the persisting confusion and inconsistent results arising over this choice of law issue in the hundreds of pending FmHA cases. As the eloquent *amicus* brief of the National Council of Farmer Cooperatives demonstrates, the decision below "has created chaos in farm commerce and credit." (*Amicus* Br. 9.) Settling the issue once and for all will lessen court congestion and costs and allow agricultural commerce to proceed as

before under the neutral, fair rules of the UCC. For these reasons, as well as for the need to reverse an unfair and erroneous decision, petitioner asks that certiorari be granted.

Respectfully submitted,

WAYNE H. HOECKER
JOSEPH A. COLUSSI
(Counsel of Record)
GAGE & TUCKER
2345 Grand Avenue
Post Office Box 23428
Kansas City, Missouri 64141
(816) 474-6460

Counsel for Petitioner

Of Counsel for Petitioner:

JAMES T. MALYSIAK
FREEMAN, FREEMAN & SALZMAN, P.C.
Suite 2700
401 North Michigan Avenue
Chicago, Illinois 60611
(312) 222-5100

DATED: January 10, 1986

APPENDIX G

United States of America, Appellant, versus
Richard E. Tugwell, Appellee

No. 85-1157

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Slip Opinion

Argued August 1, 1985

September 25, 1985

APPEAL-STATEMENT:

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge. (C/A 84-435)

COUNSEL:

Richard L. Robertson, Assistant United States Attorney (Kenneth W. McAllister, United States Attorney on brief) for Appellant.

Daniel E. Garner (Richard M. Hutson, II on brief) for Appellee.

OPINION:

Before PHILLIPS and SNEEDEN, Circuit Judges, and JONES, United States District Judge for the Western District of North Carolina, sitting by designation.

PER CURIAM:

The Farmers Home Administration (FmHA), a secured party holding a perfected security interest in farm equipment, sued Richard E. Tugwell for conversion after Tugwell bought the equipment from the debtor. FmHA alleged that the equipment, a grain combine, broke down during its use by Tugwell and that Tugwell has wrongfully deprived FmHA of its rights to the combine. The issue is whether, under the facts alleged by FmHA, Tugwell is entitled to summary judgment. The district court found that although the facts technically established conversion, the case was not an appropriate one for maintenance of a conversion action and gave summary judgment for Tugwell. We reverse.

I

FmHA took a security interest in a grain combine owned by Thurgood M. Bradshaw as a security for loans Bradshaw owed to FmHA. Bradshaw sold the combine to Tugwell, who apparently was unaware of FmHA's security interest, without the authorization of FmHA. Tugwell used the combine for a short time until it broke down, and thereafter, he stored the machine after removing its wheels. FmHA was unable to locate Bradshaw in order to collect its loans, and therefore, filed suit against Tugwell for conversion seeking the fair market value of the combine at the time of conversion as damages. Tugwell offered to replace the wheels and tender the combine to FmHA, but only on the condition that FmHA pay him for storage expenses.

When the Government sued Tugwell for conversion, the district court granted summary judgment to Tugwell on the basis that under relevant federally adopted state law, conversion was not an available remedy to the FmHA as holder of a security interest. This appeal by the Government followed.

II.

Federal law governs this dispute concerning FmHA's rights under a nationwide federal program. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979). The relevant federal law is, by adoption, local state law, here the law of North Carolina, because the need for national uniformity is not great, adoption of North Carolina law will not frustrate the FmHA program, and adoption of a rule different from local law could disrupt local practice. See *id.* at 728-40; *United States v. Friend's Stockyard, Inc.*, 600 F.2d 9, 10 (4th Cir. 1979).

Under N.C. Gen. Stat. § 25-9-306(2), FmHA's security interest continued in the combine after the sale to Tugwell because FmHA did not authorize the sale and Tugwell did not qualify for protection under § 25-9-307. Official Comment 3 to § 306 states that § 306(2) allows the secured party to obtain satisfaction against either proceeds in the hands of the debtor or the collateral in the hands of the purchaser. The Official Comment there states that "the secured party may repossess the collateral from [the transferee] or in an appropriate case maintain an action for conversion." (Emphasis added.)

Under North Carolina law, FmHA must prove its interest in the combine and Tugwell's unauthorized dominion over it to establish a cause of action for conversion. See *Peed v. Burleson's, Inc.*, 244 N.C. 437, 94 S.E.2d 351, 353 (1956). FmHA's security interest in the combine is a sufficient interest to ground an action for conversion. See *United States v. Pete Brown Enterprises, Inc.*, 328 F. Supp. 600 (N.D. Miss. 1971) (applying North Carolina law); see also N.C. Gen. Stat. § 25-9-306 Official Comment 3. In addition, Tugwell's act of taking possession of the combine with intent to acquire in it a proprietary interest that Bradshaw was not empowered to give represents sufficiently serious unauthorized dominion over the combine to fulfill the second element of the tort. See Restatement (Second) of Torts § 229 & comment b (1966).

III

The district court found that FmHA had technically established that Tugwell converted the combine. This finding is not clearly erroneous since FmHA established its ownership interest in the combine and serious unauthorized dominion over it by Tugwell.

Nevertheless, the district court gave summary judgment for Tugwell after noting that N.C. Gen. Stat. § 25-9-306 Official Comment 3 states that the secured party may sue for conversion in appropriate cases. Apparently construing the "appropriate cases" reference as conferring judicial discretion to withhold the remedy due to equitable considerations, the court held that this was not an appropriate case for maintenance of a conversion action. In the court's view, FmHA had a security interest in the proceeds of the sale in the hands of Bradshaw, the debtor, and in the interests of fairness it should be required to seek those proceeds before seeking conversion damages against Tugwell, the transferee.

We disagree with the district court's interpretation and application of the "appropriate case" reference. We conclude that it simply means that where the facts justify recovery of damages for conversion, this is an appropriate alternative remedy that may be pursued by the security interest holder. In *Pete Brown Enterprises*, 328 F. Supp. at 605-06, the court noted that North Carolina law "does not impose upon the secured creditor a legal duty to proceed against the debtor as a prerequisite to suit against a converter." Indeed, the Official Comment states that the "secured party may claim both proceeds and collateral, but may of course have only one satisfaction." The "appropriate case" language of the Official Comment therefore means only that the traditional elements of the conversion action must of course be present, not that other remedies must have been exhausted, or that exhaustion can be judicially required as a prerequisite to invocation of the conversion remedy.

IV

Hence we reverse the grant of summary judgment for Tugwell, affirm the finding that Tugwell converted the combine, and remand for entry of partial summary judgment in favor of the Government on the issue of Tugwell's liability. The measure of damages for conversion is fair market value of the converted property at the time of conversion plus interest. *Crouch v. Lowther Trucking Co.*, 262 N.C. 85, 136 S.E.2d 246, 247 (1964). The issue of damages due under that measure remains for determination upon remand.

REVERSED AND REMANDED.

(6)

SUPREME COURT OF THE UNITED STATES

MISSOURI FARMERS ASSOCIATION, INC.
v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85–727. Decided March 3, 1986

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In this case the United States Court of Appeals for the Eighth Circuit held that a federal regulation provides the appropriate rule for deciding whether the Farmers Home Administration (FmHA) retains a continuing security interest in collateral to whose sale the FmHA allegedly consented.* 764 F. 2d 488 (1985). The question presented is whether, under *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979), the Eighth Circuit erred in looking to federal regulations rather than state law for the rule of decision.

In *Kimbell Foods* this Court determined that although federal law should determine the priority of liens stemming from federal lending programs, a national rule is not necessary to protect the federal interests underlying the loan programs of

---

*The regulation on which the Eighth Circuit relied is 7 CFR § 1962.18(b), which at the time the case was decided provided in relevant part:

"When borrowers [from the FmHA] sell security, the sale will be made subject to the FmHA lien. The property and proceeds will remain subject to the lien until the lien is released or the sale is approved by the County Supervisor and the proceeds are used for one or more of the purposes stated in § 1962.17."

This regulation has since been rewritten as 7 CFR § 1962.17(a), which provides that "[w]hen the borrower sells security, the property and proceeds remain subject to the lien until the lien is released by the County Supervisor." This change in wording is immaterial to the issues presented in this case.

2 pp

the Small Business Administration and Farmers Home Administration. Thus, we held that "absent a *congressional* directive, the relative priority of private liens and consensual liens arising from these Government lending programs is to be determined under nondiscriminatory state laws." 440 U. S., at 740 (emphasis added).

I find it difficult to reconcile the Court of Appeals' decision with *Kimbell Foods*. A federal regulation is not a Congressional directive, and although *Kimbell Foods* involves a question of lien priority while the present case concerns the extinguishment of a federal lien, that distinction is tenuous at best.

Besides being in obvious tension with *Kimbell Foods*, the Court of Appeals' decision conflicts with the decision in *United States* v. *Tugwell*, 779 F. 2d 5 (CA4 1985), which holds that under *Kimbell Foods* the question whether a FmHA lien is extinguished upon sale of the collateral must be resolved by looking to state law. I would grant certiorari to resolve this conflict among the Courts of Appeals.